THE

MONTHLY LAW REPORTER.

DECEMBER, 1862.

COMMON LAW AND ROMAN LAW.

THERE is between the law of a country and the character of its inhabitants an organic relation like that existing between the latter and the language they speak. Neither law, nor language, nor manners, are the result of caprice. They all originate in and grow with the people. Hence, the law of a people has, like its language, no moment when it is absolutely stationary. It constantly develops itself with more or less activity, and never rests, except when the people ceases to be living. This explains the love people have for their law. Every citizen extols it with a natural partiality, for the love of one's country and its law are inseparable. That law which is a part of the common life, and lies in the conscience of all, has been justly called *Common Law*.

Every nation has or has had its Common Law, and it cannot be said that one is absolutely better than another, for as every people has its peculiar features and its own destinies, so it has its peculiar inborn sense of justice, of which its Common Law is the expression. This law suits it best, for it made it, or rather it was made for it.

The first origin of law has its cradle in the family; its first form is the customary law, and its first abstractions are proverbs.

The origin of religion is cotemporary with that of language and law, and justice appears at the infancy of all nations as a religious duty, the violation of which is punished by the Deity. Hence, in the first age of a nation, law always forms a part of religion, and priests are its protective power. This relation between religion and law is another cause for citizens to venerate the latter, whenever it has not been imposed upon them violently, and their legislators have not altered its character. Legal transactions are often accompanied by religious forms, consisting in symbolical acts, by which they obtain their judicial validity; for the rules of law do not enter the mind of a primitive people, unless they strike its senses and are frequently repeated. From the family where it originates, law successively extends as the numbers increase, over a horde, a clan, a tribe, a people, a nation.

The first stage of legal development in a nation may be short or long. But there is in all countries a time when the law gradually escapes from the mind and memory of the people at large, when it ceases to be in the possession of the community, and when it is no longer transmitted by the father to his children; a time when the primitive customs suffice no longer, for they are not adopted to new relations and duties of life. Labor divides itself, and a particular class of men arises, whose task is to work out the principles of the law, to form new rules for new wants, to apply them and to teach them. Thus law-making passes over from the people to the learned. The judiciary, the legislative, and the executive powers, which all were united in one and the same hand, now form as many independent manifestations of the people's life. In such a state of things, law runs the risk of losing its national character, for legislators, seduced by theories or political interest, may deviate from the Common Law. It then becomes incumbent upon the State to create Law Schools, with the view of keeping alive and perpetuating the principles of that Law. There can scarcely be a more imperious duty for a government, than to patronize schools in which are to be trained the Levites called to keep that holy ark of the Covenant, in which the Fathers have deposited the Sacred Law of the country. Thus, the Romans, considering that their national law was a part of their existence, ordered the Twelve Tables, not only to be engraved on brass and posted in the Forum, but to be taught in the schools. The necessity of an adequate teaching of the Law, especially the Common Law, which is the Palladium of American liberty, is moreover to be measured by the great influence (greater here than anywhere else) lawyers have over the course of public affairs, and the fact that no other class of men can do so much good or so much harm to the Commonwealth.

Although all nations in the development of their law pass through various stages, it is not granted to all to witness a period of jurisprudence. The Greeks, the most polished people of antiquity, never saw it. In fact, the science of law is not congenial with all nations, and is not necessarily accompanied by a high degree of national culture. However near to perfection jurisprudence was with the Romans, it never went much farther than a systematical study of cases, and though they tried to bring the whole Law into the shape of a rational system, the philosophical part of it was but little taken by them into consideration. It would seem that the French have been more successful than any other nation in their legislative works. Besides that their language proves to be better adapted than any other to legislation, they understand remarkably well the art of combining the scientific with the practical side of the Law, and do not fall in this respect into the extremes of their neighbors of Germany and England.

In Europe, and especially on the continent, a most minute attention is paid to the sources of the law, for they are justly considered as the best key both to its comprehension and to its interpretation. Not a single spot of her soil remains unexplored. Governments and individuals vie with each other in those investigations, the results of which are carefully published and commented upon. Everything that may contribute directly or indirectly in shedding light over the history of the law, and consequently the law itself, is noted and collected. A glance cast at *Grimms' Law Antiquities* shows how extensive a field the Germans have opened wherein to lay the foundation of their future Codes. The time is not far distant, when Savigny himself, if this great master still lived, would say, "Now we are sufficiently prepared and equipped to undertake the great, important and difficult task of a Codification."

That spirit of inquiry after new sources is not found in those States alone in which Codes are not yet in existence, as we shall see. In his History of the Judicial Institutions of Europe, Meyer speaks in the following words of the charms attached to those researches, and their practical utility:—

"Of all the monuments which relate to past ages, none are more interesting than the laws and the judicial institutions of a country. Its annals, inscriptions, and medals, may be useful to establish the date of events; but as they often are dictated by flattery or animosity, by the desire of reviling or making illustrious, by complacency or hatred, we cannot fully rely upon their contents, for they are frequently exaggerated; whilst the laws and legal institutions of a people which have no other object in view but to regulate its concerns, show its true condition, both without ostentation and without concealment, and exhibit its real wants, virtues, and vices. Intimately connected with the manners and usages of a nation as are the laws, they are the purest source from which we may draw the philosophy of history. He who wishes to describe the progress of mankind must first of all become acquainted with the laws which have successively ruled over each people; he must illumine history by the laws."

This necessity of applying history to the study of the law in all its branches has been so generally acknowledged, that special chairs for Legal History have been founded in all the universities of Continental Europe. The student has indeed to solve the following questions: 1st. How far have we come? 2d. What has been done up to this time? 3d. What remains to be done? and this he cannot do, except with the aid of the light of History and Philosophy.

In respect to historical studies, the French have nobly entered the lists opened by the Germans, and their studies have led them to acknowledge how great a part of the Germanic element has

passed from the Franks, the Burgundians, and others, their ancestors of Germanic race, into their present Code.

Everybody knows that before the revolution, France was divided into two regions, one in the South, the abode of the written or Roman Law, the other in the North, that of the Customary Law, full of Germanic elements. From these two elements, the present Code Napoleon has been chiefly made. Speaking of the latter on a solemn occasion, Rossi exclaimed: "Honor to the authors of that majestic work! They have fulfilled a grand mission, and as long as the words of civil equality and national unity, that is of power, prosperity and justice shall have a meaning among men, the glory of the authors of the Code shall be imperishable."

If we now turn our eyes to the state of things in France before the promulgation of the Code, we shall find the following picture drawn by the illustrious Portalis, in his report favoring the adoption of the Code:—

"What a sad spectacle offered itself to the commission charged with the redaction of the Code! We had before us nothing but a confused and indigested mass of foreign and French Laws, general and particular customs, ordinances abrogated and not abrogated, written and unwritten maxims, contradictory regulations, conflicting decisions, nothing but a mysterious labyrinth, the thread of which ever escaped from our hands, so that people were in constant fear lest they should go astray in that immense chaos."

And Jaubert, an orator to the Tribunate, speaking on the same subject, says: "The diversity that reigned in the laws, disgraced human reason; that which was allowed in one part of France was disapproved in the other. The rules as to persons and property were not similar in two neighboring provinces; nay, they often differed in the same province, even the same town. Hence, how many obstacles, uncertainties and errors!"

Well, notwithstanding the promulgation of the Code and those declamations, all the above named monstrosities have become in the last thirty years a field of study for eminent jurists. More than that, chairs have been established in the law schools of France for the teaching of the law in its feudal and customary origin.

The following words, addressed at the inauguration of a chair of customary law, at Toulouse, in the very heart of the former region of Roman Law, to the students of the faculty, show that the spirit of investigation cannot be checked by any compilation on Common Law or any Code, however perfect it may be, and that the study of the materials by the aid of which they have been drawn up, are practically useful and scientifically necessary:—

"To some of you, a course on customary law may appear a monstrous anachronism, a strange anomaly, a repudiation of all the glorious conquests made by our fathers in compiling the im-

mortal codes which they have bequeathed us, an attempt to resuscitate a past which our codes have rejected, and the use of which hey have proscribed. But this is not our task. We are not here to try to resuscitate that past, to re-habilitate it by dint of erudition. As men of the present, we shall repudiate none of the conquests made by our fathers or in the present age, and if we submit to your meditations and studies the Customary Law, it is not because of its character of antiquity, but as being connected with the present age, as forming a part of its principal elements. We shall not study the Customary Law because of its antiquity, as an archeologist might do, but in spite of its antiquity. By teaching our old Common Law, it is not the past only that we have to review, but the present; it is not the dead part of that Law, but that part of it still living in our Code.

"Thus considered, the Customary Law must be studied by all desirous of devoting themselves to a thorough study of our present law. It is of practical utility, for many provisions of our Codes cannot be understood, except by the help of the customs from which they are derived. Our legal institutions have been naturalized by our customs, and a legislator must never lose sight of the natural relations which always connect more or less the present with the past, and the future with the present. Nothing that can keep a nation alive and prevent it from ceasing to be like itself, must be neglected."

Like the old *coutumes*, the Roman Law forms a chief source of the present French Code, and as such is taught by several Professors in all the Law Schools of France where its study has been made obligatory.

Our American Common Law, like the French Law, is a combination of various elements; and for the reasons above given, a special study of all of them would be most beneficial for the comprehension of the whole system, and we venture not much, we think, by saying that the time is not very distant when our Law Schools, which have already done so much good, and show so much life, will be provided with additional means of instruction, made necessary by the successful efforts of our Professors to elevate among our youth, eager for science, the standard of Jurisprudence.

One of the most important chasms to fill up in our legal education is the teaching of the Roman Civil Law. If we are well informed, the State of Louisiana is the only one in our Union where a special chair has been established for it. That State had, as we know, particular reasons for the introduction of that branch of Jurisprudence in its Law School. But have not the others, justly anxious, like the European Governments, to maintain and develop the principles of their Common Law, the same motives to patronize

the study of the Roman Civil Law? This argument may appear to some as paradoxical, but their doubts may soon be removed.

The Roman Law is not only historically and archeologically of interest. It is not only the Law of a nation which has ruled the world for a thousand years, not only the law from which all nations have largely borrowed; it is not only attractive in itself, but of a real practical value. First as a model. It has been said with justice, that no historical and moral science ever approached more nearly to mathematical precision than the Roman Law; that no Law was in its method superior to it, and that its art of applying principles to cases was unsurpassed.

In regard to its language, it combines admirably clearness with conciseness, and thus it commends itself highly to the study of legislators in general; and history shows that the countries which have been most subject to the influence of the Roman element are superior to the others in respect to both system and style in their laws. We send our artists to Rome, to study the masterworks of the ancients; why should we not go to the school of the Roman Law if it occupies so high a rank in legal science, a rank which is acknowledged by all? In this country of Common Law, its merits are extolled by all authors, even sometimes to exaggeration. The same occurs in Great Britain, where, notwithstanding those praises, the teaching of the Roman Law is almost a dead letter at Oxford and Cambridge. The superiority of the Scotch lawyers has been often attributed to the attention they pay to the Roman Law, which is said to be more cultivated at Edinburgh than in the two universities just mentioned. Cheering news comes from the University of London, where several chairs have been established for that important branch of general law; it authorizes us to augur better times for jurisprudence and legislation in England.

We quote with a just pride a few authors of the thirteenth and fourteenth centuries, which we call the classical age of jurisprudence in England, and acknowledge that their influence over the whole course of Law has been felt up to our time. But we are too liable to forget that they derived their superiority from the study of the Roman Law. Why then should we not derive the same benefits from that never to be exhausted source? And as to the writers who came after that bright period of jurisprudence, though endeavoring to show that "the Common Law of England was the most reasonable and the most ancient in Europe, and superior to Civil Law," they bear witness how much they owe to it, by the very way in which they write on the Common Law, as only men could do who had not remained, in spite of themselves, strangers to the traditions of the Civil Law Schools.

It gives us pleasure to quote in this connection the author of the

Historical Essay of the Laws of Rome (Pref. IV. Cambridge, 1827).

"The Jurisprudence of Rome has formed the groundwork of the jurisprudence which to this day governs almost every nation of Europe. England is, perhaps, less indebted to it than any of the continental nations; but even the English Law owes it many and deep obligations, and the neglect in which it has fallen in this country must be imputed to motives very different from its want of connection with our own system of jurisprudence."

We fully agree with these views, but regret at the same time that those motives are not set forth more openly and forcibly by men whose situation and connections would lead them to declare and carry on war against existing prejudices.

Speaking of the *legitimatio per subsequens matrimonium*, which has been adopted in most civilized States, but to which the English were ever opposed, Kent, in his Commentaries, II. 227, says: "The opposition of the English barons to the introduction of the Civil Law (in this special matter,) is supposed to have arisen not so much from any aversion to the principle itself, as to the sanction which would thereby be given to the superiority of the Civil over the Common Law." We are less unbiased than were the English barons, and not so much infatuated with what is ours, as not to adopt what does not belong to us, merely because of its superiority.

This prejudice reminds us of the following anecdote: In a remote and mountainous little Canton of Switzerland, where people idolized their Common Law, certainly as ancient as any in the world, a lawyer just returned from the university, had the misfortune to quote in court the Roman Law. No sooner was this done than the magistrate presiding rebuked him with a thundering and fulminating voice, and ordered him to leave on the spot, bar and house, and never to return until he had recovered his senses.

If the assistance given to the Common Law by the Roman Law is acknowledged, why should not the latter become an object of special study, and be taught with us, as is the case in all the most progressive States of Europe, be they ruled by Codes or not, by the Common or the Civil Law?

To those who would object that the Law under which we live is the Common Law, we would answer: Let us religiously keep and study it in all its parts, let it remain the basis of all our legal information; but for its own sake, let us not be more exclusive nor less hospitable than it is itself, and like itself, let us give to the Roman Law an honorable seat at the banquet of jurisprudence. We would even insist upon its being formally invited to it, for the laws of all civilized States are the members of a unit called Jurisprudence. So the members of the human body are many. The

eye cannot say to the head, I have no need of you, nor again the head to the feet, I have no need of you.

Moreover, it would be too late for us to treat the Roman Law as a stranger, for many centuries since it made its application to be naturalized, and has obtained the right of citizenship. It is with us, in our midst, in our laws. You will find it in our books, in our methods, in many parts of our legal system, as in wardship, easements, wills, contracts, and others, and especially in the latter, which play so great and diversified a part in our system of laws; and we shall have it more and more as new relations in life and business arise, for the Roman Law has such a flexibility that it easily and readily complies with new situations.

If such be the case, why should not we study it, and become conversant with the way of applying the same, and learn the art of combining it with the Common Law without endangering the latter? But the knowledge of the Roman Law cannot be obtained from books, especially as English literature is not rich on that subject. It has been argued that our students have no time to devote an hour additional daily to the study of the Roman Law, but if that study be important, the time for it must be found, as it has been found elsewhere, and the study of that law from books, supposing it could take place, would not prove an economy of time for the student.

If we open our own works on the Common Law, we shall find them richly provided with quotations from the Roman Law, which we must be able to understand to appreciate their value and seasonableness. The same can be said of the citations of that Law made before our courts, where they are received more hospitably than they were in the part of Switzerland above alluded to.

It is through the study of the Roman Law, that the Germans have been led to the study of their Common Law, and have learned to appreciate it as it deserves; thanks to the methods of the former, the latter has acquired a broad basis and a richness of materials without parallel among all Common Laws existing; and by embracing in their investigations all the nations of Germanic race, Burgundians, Franks, Visigoths, Anglo-Saxons and others, the Germans have been enabled the better to comprehend the spirit of their own institutions. Furthermore, the German Common Law, which has, with ours, a most striking likeness of a common descent, is indebted for its present remarkably scientific form to the Roman Law; and all the countries of Europe, from Portugal to Greece and Russia inclusively, have derived the same benefit from the same source, without impairing the existence of the National Law. In their investigations over all countries peopled by their brethren of the same origin, the Germans have paid particular attention to the law and the judicial institutions of the Anglo-Saxons and their

descendants in the United Kingdom and the United States; and it is but just to state that one half, at least, of the information we possess on the history of the law in England, we owe to the labor of continental writers, and not less just to say that the English have become of late better acquainted with the works of their neighbors, and have entered actively upon the field of jurisprudence, where their practical sense will render great services. The channel is no longer considered by them as a barrier behind which they are to live. Their frequent relations with the continent cannot fail to have upon the latter a favorable influence, and it is to be expected that they will derive for themselves much benefit from it, especially in regard to jurisprudence, legislation, and legal training.

The Anglo-Saxon race has been hitherto called by Providence to high destinies. This people, which in its infancy occupied a small tract of land in the forests of Northern Germany, left fifteen hundred years ago its dark abode, went West, crossed the channel, and settled on an island partly inhabited by the Romans. There, in the course of time, they received an additional Germanic element in the Normans, and, six hundred years after, some of the descendants of those mixed races crossed the wide sea and established themselves on these shores, where they have become a great and independent nation. Like their fathers in England, they have received, as they still uninterruptedly receive, new elements of life, especially of the same Germanic race from the European world, and they now occupy with them an immense continent stretching from ocean to ocean, and now seated on the latter's shore, they turn their eyes towards Asia, as if preparing to cross another still wider sea, another still larger continent, to go to the cradle of mankind.

This infusion of foreign blood into the Anglo-Saxon race by immigration will make it the better able to accomplish its great destinies. But with their blood, those immigrants also bring over their ideas and their penates; both belong to their existence, and they necessarily must find their way into the adopting nation, and combine in a greater or less measure with the indigenous elements.

Among such imported notions is that of law, which is as inherent to man as his language. Of course, the immigrant gives obedience to the law of his adopted country; but, in the course of time, his notion, imperishable in itself, through some channel finds its way into the body politic; not by conquest, as the Norman Law was introduced into England, but by the very nature of things, and we think it would not be very difficult to trace out the influence foreign elements have had upon the law of this country, from the moment of the first arrival of its English settlers.

This fact renders all the more desirable the study of European

Law, and before all, of the Roman Law, the better to appreciate the allowance to be made to that foreign element.

With all nations, but especially with a nation such as the United States, called to such high destinies, the Law is a powerful auxiliary to attain the end they have in view. It will teach them not only their own rights, but also the rights of others. Upon the observance of both, depends peace within and without. Hence, the State is highly interested in having Law Schools, and patronizing them in a measure adequate to their importance.

Great efforts have been made recently in England to raise the standard of her legal studies, which have been found by competent and impartial men to be very deficient. Are not we partly laboring under the same wants? To answer this question, we would chiefly refer to the most interesting "Report of the Commissioners appointed to inquire into the arrangements in the Inns of Court and Inns of Chancery for Promoting the Study of the Law and Jurisprudence. London, 1855;" a report which shows the great importance the English government attach to legal studies of a high character, and in which we find the opinions given on the important subject of Law Schools, by men occupying both in England and on the Continent the highest scientific rank. But if England has taken the lead in considering that great question, we are still in time to take the lead over her in acting upon it.

One more word. What makes the English language so rich and so susceptible of appropriation? Its readiness in taking words corresponding to new ideas, wherever they are found. The Roman or Latin element occupies now one-half and more of it, whilst, before the conquest, its type was exclusively Germanic. Now it is through the combination of the two greatest elements of civilization, the Germanic (this word taken again in its broadest acceptation) and the Roman, that the English language has become, and is still becoming better able to appropriate to itself a greater part of the world.

We have seen that law and language have the same divine origin, and that they are called to develop themselves in like manner. At present, the English language is in advance of the English law, because the former has come into contact with the Roman element, whilst the other was turned away from that natural and fecundating connection by political causes known to all.

How much our Common Law would gain by a closer contact with the Roman Law, is illustrated by the remarkably developed state of the Common Law in several countries of Continental Europe, compared with the law of the Scandinavian kingdoms, which have remained, like England, almost entirely strangers to the movements of legal notions that have taken place in countries which once formed a part of the monarchy founded by Charlemagne.

SELECTIONS FROM THE OLD REPORTERS AND TEXT WRITERS.

In "The Epistle Dedicatory" to Croke's Reports, Sir Harbottle Grimston writes of the reporter, his father-in-law, that he was continued a judge of the Court of King's Bench, "till a *certiorari* came from the great judge of heaven and earth, to remove him from a human bench of law to a heavenly throne of glory."

The gravity of the poor laws was enlivened, and the sterility of settlement cases agreeably refreshed, by a catch introduced by Sir James Burrow into the report of *Rex* v. *Norton*.[1] The reporter says, "I do not find the case of *Shadwell* and *St. John's Wapping* (which had been cited in the argument) in any printed book or manuscript. But I guess it to be the same case which I have heard reported in the form of a catch, to the following effect (if my memory serves me right) :—

"A Woman having a Settlement,
Married a Man with none;
The Question was, he being dead,
'If that she had, was *gone*.'
Quoth Sir *John Pratt*[2]—'Her Settlement
SUSPENDED did remain
Living the husband: But, him dead,
It doth *revive* again.'"

CHORUS *of Puisne Judges.*
Living the Husband: But, him dead,
It doth revive again.

The case of *The King* v. *Burford* is thus reported in Ventris[3] :—"He was indicted, for that he scandolose & contempuose propalavit & publicavit verba sequentia, viz.: That none of the justices of the peace do understand the Statutes for the Excise, unless Mr. A. B., and he understands but little of them; no, nor many parliament-men do not understand them upon the reading of them. And it was moved to quash the indictment, for that a man could not be indicted for speaking such words; and of that opinion was the court: But they said he might have been bound to his good behavior." If a man was indicted in this country at the present day for speaking similar words, he might with great propriety plead the truth in justification.

Words spoken of an attorney, "Thou canst not read a declaration," per quod, &c. THE COURT. The words are actionable,

[1] Burr. S. C. 124. [2] Then Lord Chief Justice.
[3] 1 Vent. 16.

though there had been no special damage; for they speak him to be ignorant in his profession, and we shall not intend that he had a distemper in his eyes, &c.—Judgment was given for the plaintiff.[1]

"One of the cases in Littleton," says Mr. Wallace,[2] "would present but a bad idea of the manners at Oxford, in 1625. We find, at least the Principal of St. Mary's Hall libelling one of the Masters of Art, and a Commoner of the same Hall, '*pur ceo que il appel luy* Red Nose, Mamsey Nose, Copper-nose Knave, Rascal, and Base Fellow *et autres words non dissonant.*'[3]

"Another case speaks as ill of the behavior of communicants in those days of Archbishop Laud. The Reverend Mr. Burnet sues one Symons in the High Commission Court, '*pur ces que appel luy fool en leglise et dit a lui Sirrah! Sirrah!*' and because, moreover, he, Burnet, being vicar there, Symons, at Whitsuntide, after the Communion was ended, took the cup and drank all the wine that was left; and that when Mr. Burnet took the cup from him 'Symons violently *reprise ces hors de ses mains arriere in facie Ecclesiæ devant que les parishioners fueront tous dehors leglise.*' It is curious, and perhaps worth noting, that the court decided that all the wine that was left after the communion belonged to the parson. The same declaration will be found, I believe, in the rubric to the Book of Common Prayer, printed in the time of Charles II. It shows the doctrine of that day, though at present a special and more reverent provision is made for the case."[4]

In an appeal of death, the defendant waged battel, and was slain in the field; yet judgment was given that he should be hanged, which the judges said was altogether necessary, for otherwise the lord could not have a writ of escheat.[5]

An English monk goes into France, and there becomes a monk; yet is he capable of any grant in England, because such profession is not triable, and also because all profession is taken away by statute, and by our religion holden as void.[6]

It is a rule of law, that *idem non potest esse agens et patiens;* and therefore a man cannot present himself to a benefice, nor sue him-

---

[1] Jones *v.* Powel, 1 Mod. 272.

[2] The Reporters, 3d ed. 193. Mr. Justice WILLIAMS delivering the judgment of the whole court in Farrall *v.* Hilditch, 5 C. B. N. S. 855, speaks of this book, the work of an accomplished scholar, as "highly valuable and interesting."

[3] Ralph Bradwell's case, Lit. 9.

[4] Barnett *v.* Symons, Lit. 154.

[5] Co. Litt. 390, n.

[6] Ley's case, 2 Roll. 43.

self.[1] So no man can summon himself; and therefore if a sheriff suffer a common recovery, it is error, because he cannot summon himself.[2] A man cannot be both judge and party in a suit; and therefore if a judge of the Common Pleas be made judge of the King's Bench, though it be but *hac vice*, it determines his patent for the Common Pleas; for if he should be judge of both Benches together, he should control his own judgment; for if the Common Pleas err, it shall be reformed in the King's Bench.[3] Littleton, Chief Justice of the Common Pleas, made Lord Keeper, yet continued Chief Justice. So Sir Orlando Bridgeman was both Lord Keeper and Lord Chief Justice of the Common Pleas at the same time, for these places are not inconsistent.[4]

If one that is seised in fee of an orchard, makes a feoffment of it to *J. S.*, and goes into the orchard and cuts a turf or a twig, and delivers it in the name of seisin to the feoffee over a wall of the same orchard, the feoffee then being on other land not mentioned in the feoffment, this is a void livery.[5] As to when a man shall give and take by his own livery, see Perkins, s. 205.

The following is the charter given by William the Conqueror to Norman Hunter:—

I William the third year of my reign
Give to thee Norman Hunter
To me that are both leef and dear
The Hop and the Hopton
And all the bounds up and down
Under the Earth to Hell
Above the Earth to Heaven
From me and mine
To thee and thine
As good and as fair
As ever they were
To witness that this is sooth
I bite the white wax with my tooth
Before Jug Maud and Margerie
And my youngest son Henry
For a bow and a broad arrow
When I come to hunt upon Yarrow.[6]

---

[1] Litt. 147 b.
[2] Dyer, 188 a; Owen, 51.
[3] See Cro. Car. 600.
[4] 1 Sid. 338, 365.
[5] 2 Roll. 6, pl. 5.
[6] See Speed, 424, b; 2 Roll. Abr. 181; Merton's Anglorum Gesta, in Vita IV. 1.

A., the attorney of *B.*, brought an action against *C.* for saying to *B.*, "Your attorney is a bribing knave, and hath taken twenty pound of you to cozen me." Judge WARBURTON held the words not actionable, for an attorney cannot take a bribe of his own client; but HOBART said he might when the reward exceed measure, and the end of the cause of reward is against justice; as if he will take a reward to raze a record, &c. And HOBART says, after he had spoken, Justice WARBURTON said that he began to stagger in his opinion, so the plaintiff had judgment.[1]

An infant brought an action of trespass by her guardian; the defendant pleads that the plaintiff was above sixteen years old, and agreed for sixpence in hand paid, that the defendant have license to take two ounces of her hair; to which the plaintiff demurred; and adjudged for her, for an infant cannot license, though she may agree with the barber to be trimmed.[2]

A woman shook a sword in a cutler's shop against the plaintiff, being on the other side of the street; and in trespass for assault and battery, there was a verdict of the assault, and not guilty of the battery. It was prayed to give no more costs than damages, and so granted; which was a noble.[3]

Let the following case be a warning to all bad cooks. Trin. 8 Hen. 4. Rot. 47. Willielmus Milburn recuperat per juratam per billam suam, in quâ queritur versus Johannem Cutting Cook de eo quod ipse Johannes apud Westmonasterium vendebat dicto Willielmo unum caponem pistum corruptibilem et recale factum, qui capo assatus per quatuor dies in Hospicium Domini Regis et iterum calefactus et pistus extitit de quo postquam edit vomitum horribilem fecit, ita quod infirmabatur per duas septimanas recuperat inquam viginti solidos per damnis. And Rolle says he was informed that it appears upon the record at large that the judges increased the damages.[4]

A guest comes into a common inn, and the host appoints him his chamber, and in the night the host breaks into his guest's chamber to rob him: this is burglary.[5]

The wearing of a sword, after one is bound to his good behavior, no breach of good behavior now, as perhaps it was heretofore,[6] when swords were not usually worn but by soldiers; for then they struck as great a terror in people as a blunderbuss does now. But since

[1] Hob. 8, 9; and 1 Roll. 53.
[2] Scroggan *v.* Stewardson, 3 Keb. 369.
[3] Smith *v.* Newman, 3 Keb. 283.
[4] 1 Roll. 89.
[5] Dalton, cap. 151, *in nota.*
[6] See Comp. Just. Peace, 119, 126.

at this day swords are usually worn by all sorts of people, this cannot now be construed a breach of the good behavior; so that which heretofore was a crime, is now by custom become none.[1] So that it would seem, that as swords are now not ordinarily worn, except by soldiers, it would, at the present time, be considered a breach of the peace to wear a sword.

A Danish writer assures his readers that the taste for hanging is so prevalent in England, that criminals, who are to be hanged, go laughing and singing to the gallows, and, in the absence of the executioner, hang themselves. "*Ad loca supplicii non ducuntur Angli, sed currunt, ridendoque cantando, facetiis spargendo, et circumstantibus insultando moriuntur; ubi desunt carnifices se ipsos sæpe suspendunt.*"[2]

When Lord Coke was presented by Lord Bacon with a copy of the *Novum Organum*, with the title of *Instauratio Magna*, he wrote under the hand-writing of Bacon—

"Auctori consilum.
Instaurare paras veterum documenta sophorum
Instaura legis justitiam que prius."

And over the device of the ship passing under the pillars of Hercules—

"It deserveth not to be read in schools,
But to be freighted in the ship of fools."

In the time of Alfred he ordained, that all false judges, after forfeiting their possessions, should be delivered over to false Lucifer, so low that they should never return again; that their bodies should be banished and punished at the King's pleasure; and that for a mortal false judgment they should be hanged as other murderers. And he gives a list of the judges executed by the King's order. In one year, we are told, that forty-four judges were hanged. He hanged Cole, because he judged Ive to death when he was a madman. He hanged Athelf, because he caused Copping to be hanged before the age of twenty-one years. He hanged Diling, because he caused Eldon to be hanged, who killed a man by misfortune. He hanged Horne, because he hanged Simin at days forbidden. But not only did Alfred hang for hanging; he maimed his judges for not maiming their prisoners. Thus, he cut off the hand of Hanlf, because he saved Armock's hand, who was attainted before him, for that he had feloniously wounded Richbold. And he judged Edolf to be wounded, who feloniously had wounded Aldens.[3]

---

[1] Hawle's Remarks, &c. p. 81. [2] Holbergii Opuscula, tom. 2, 118.
[3] Mirror, c. 5; and see 3 Inst.

A gentleman is by descent; yet, says Lord COKE, I read of the creation of a gentleman; and thus it was: A French knight came into England, and challenged John Kingston Yeoman, a good and strong man at arms, but no gentleman, at certain points and deeds of arms, &c. *Unde Rex* (saith the record) *ut dictus Johannes honorabilius in præmissis accipiatur ipsum Johannem in ordinem generosum adoptavit et armigerum constituit et cætera honoris insignia ei concessit.*[1]

There are some things personal, and so inseparably connected to a man's person, that he cannot do them by another; as the doing of homage fealty. So it is holden, that a lord may beat his villein, for cause or without cause, and the villein is without remedy; but if the lord command another to beat him without cause, who does accordingly, the villein shall have an action of battery against him. So if the lord distrain his tenant's cattle, when nothing is behind, yet the tenant, for the reverence and duty that appertains to the lord, shall not have trespass *vi et armis* against him; but if the lord command his bailiff or servant to distrain, *secus*.[2]

An action of false imprisonment brought against a constable, who pleaded not guilty, the defendant did show in evidence, that he came to search in time of the plague for lodgers in the town, and he found a stranger and questioned him which way he came into the town; who answered, over the bridge, and the judge conceived this to be a scornful answer to an officer, and because he had no pass, but travelled without one, and gave such an answer, the defendant did offer to apprehend him, and the plaintiff thereupon being present said to the defendant he shall not go to prison, but yet offered to pass his word for his forthcoming, upon which the defendant did commit the plaintiff, and it was ruled upon evidence, there was good cause to commit the plaintiff for opposing the constable, though but verbally, in his office, who is so ancient an officer of the Commonwealth.[3]

The judge did put back the jury twice, because they offered their verdict contrary to their evidence, as he held and set a hundred pound fine upon one of the jury, who had departed from his companions; but after, upon examination, it was taken off again, for that it did appear, it was only by reason of the crowd, and some of his fellows were always with him.[4]

Kerifford, an attorney, was plaintiff in battery, and the case was thus: He was walking in the market (as attorneys do too much),

[1] 2 Inst. 595 & 668.
[2] Comb's case, 9 Co. 76 a.
[3] Sheffeld's case, Clayt. 10.
[4] Clayt. 50.

and the defendant and he had some angry words there, upon which the defendant did press to go by him, and in going, by reason of the throng of people there, he jostled the plaintiff, and for this he brought this action, in which if an assault ouly be proved, it is insufficient, and holden it was no assault, for the touching him or jostle was to another end, namely, to get by him in the throng, and not to beat him, &c.[1]

Memorandum. One Mr. Guye Faux, of the parish of Leathley, a cavilleer, had a cause heard about a plunder, upon Monday this week after dinner, and was well in court, and damage against him a hundred pounds, and he was found dead next morning upon the conceit of it, as was supposed.[2]

RECENT AMERICAN DECISIONS.

District Court of the United States.

District of Massachusetts.

The Brig Lilla and Cargo. — [Prize.]

No private person can interpose in a case of prize and make claim for the restoration of the captured property, on the ground that the capture was made within neutral waters. Whatever claim is made must be presented by the neutral nation whose rights have been infringed. Even a consul, by virtue of his office merely, cannot interpose.

Where a claimant had his domicil in the enemy's country, was a permanent resident there, and the property captured was purchased as stock in a trade to be there carried on, the claim was dismissed, as coming within the decision of the court in the case of the *Amy Warwick*, 2.

If a neutral owner of a portion of the property captured, claims another part which belongs to an enemy, for the purpose of deceiving the court, the part belonging to the neutral will be condemned, as a penalty for his fraudulent conduct.

The admission of further proof rests wholly in the discretion of the court; but the exercise of this discretion is aided by certain rules. Some of these rules stated. A motion for further proof refused, where there was no reason to suppose that any further evidence of value could be produced.

The claimant making title to the captured property under the condemnation and sale thereof to him by a prize court of the so-called Confederate States, *held* that no proceedings of any such supposed tribunals can have any validity here, and that a sale under them would convey no title to the purchaser, nor confer upon him any right to give a title to others.

The rule under the statute of the United States 1800, ch. 14, § 1, concerning the restoration to their owners, upon payment of certain salvage, of merchant

[1] Clayt. 22. [2] Clayt. 116.

vessels recaptured, before their valid condemnation, by public armed vessels, held to apply to a vessel recaptur- d after a capture by a Confederate privateer, and a condemnation and sale by a Confederate prize court.

The facts of the case fully appear in the decision of

SPRAGUE J.—This vessel and cargo were captured on the 3d day of July last, off Abaco, by the United States gunboat Quaker City, and sent into this port for adjudication. The counsel for the claimant contends that the capture was made within British waters, and that the property should be restored to the claimants for that reason.

To this there are two answers. First, the fact that the capture was made within the jurisdiction of a neutral country, is not proved. Second, that if it were proved, no private person can interpose or rest a claim upon that ground. In such case, whatever claim may be presented must be by the neutral nation whose rights have been infringed. So far from a private individual being authorized to represent the nation in this respect, even a consul cannot do so by virtue of his office. *The Anne*, 3 Wheat. 435. In the case now before me, neither the British Consul, nor any other British officer, has interposed in any manner.

I now proceed to the several claims, and shall first consider that of Hewetson to the medicines, a part of the cargo. It appears that he is a British subject, having his home in Charleston, South Carolina, where he was a permanent resident prior to this capture. "His son-in-law keeps a druggist's shop in Charleston, and Hewetson is interested with him; these medicines were for his shop." It further appears that this vessel, with Hewetson on board, sailed from Charleston the 2d of March last, with a cargo of cotton and tobacco, ran the blockade, and arrived at Liverpool on the 2d day of April.

Hewetson there procured these medicines, shipped them on board this vessel, and himself took passage in her, and sailed from Liverpool on the 15th of May, bound for Nassau, New Providence, and was captured on the voyage. This claimant had his domicil in the enemy's country, was a permanent resident there, and this property was purchased as stock in a trade to be there carried on. This claim, therefore, comes within the decision of this court in the case of the *Amy Warwick*.

There are other facts proper to be noticed in this connection, which have a bearing not only upon this claim of Hewetson, but on other parts of the case. Not one of the documents or papers found on board this vessel states or indicates that Hewetson had any property on board. On the contrary, all these drugs and medicines are documented in the name of R. G. Bushby, the claimant of the vessel. The freight list declares that Bushby was the shipper thereof. The bill of lading states the same, and that they are to

be delivered to order or assigns. This bill of lading is not endorsed; that is, the shipper does not appear to have ordered the contents to be delivered to any one. Here was not only a *suppressio veri*, a concealment of the fact that these goods were shipped and owned by Hewetson, but the documents falsely represent that they were shipped by R. G. Bushby, a British subject residing in Liverpool.

I have thus far treated the question of Hewetson's right, as if he were regularly before the court as a claimant. But he is not. He has been in Boston ever since this vessel was brought in, and was in court at the hearing; and yet the only claim filed is by Applebee, as master, in behalf of the owners of the cargo, as well as of the vessel. And even in this claim Hewetson's name is not mentioned, and he is described only as "a passenger, the owner of thirty-seven packages of medicines on board." Not only his name but his residence is omitted. The language of the claim is so peculiar, that, without the exposition of it given by the counsel, I should not have deemed it a claim in behalf of Hewetson.

I next proceed to the claim to the vessel made through the master by the same R. G. Bushby.

This vessel was built in Wells, in the State of Maine, and was called the Betsy Ames, and was owned by the American claimants, Maxwell and others, inhabitants of that place. After the breaking out of the rebellion, she was captured by a Confederate privateer, under the command of Henry S. Libby, and carried into Charleston, S. C. There it is supposed certain proceedings were had in a tribunal, acting under the assumed authority of a Southern Confederacy, by which the vessel was condemned and sold, and her name was changed to the Mary Wright. The purchasers were John Fraser & Co., a commercial house doing business in Charleston. Afterwards, on the 2d of March last, she ran the blockade as before stated, and was commanded by the same Captain Libby.

She arrived at Liverpool on the 2d day of April, and on the 24th of the same month was registered as a British vessel, called the Lilla, and in the name of R. G. Bushby as sole owner. On the 15th of May she sailed from Liverpool for Nassau, N. P.

Two objections are made to this claim: first, that Bushby is merely a nominal owner, that the beneficial interest is in Fraser & Co., and that, if he holds the legal title, it is only as trustee for enemies; second, that even if Bushby was an actual purchaser for value, and for his own use, still that the original title of Maxwell and others has never been divested, and that their claim must prevail. As to the first objection, there are certainly facts which seem to be irreconcilably opposed to the supposition that Bushby was a real purchaser for his own use; while every circumstance is con-

sistent with his having lent his name to cover enemy's property, and taken the legal title in trust for that purpose.

The shipping articles declare that Fraser, Trenholme & Co., are the managing owners. These articles bear date the 13th of May, the same day on which the vessel cleared at the Custom House. In this document they are not only declared to be the owners, but the managing owners. Further than this, it appears from the testimony that the advance wages of the crew were actually paid by Fraser, Trenholme & Co., and there was found on board a return list of the crew, stating the monthly wages and the amount of the advance wages of each. This is directed on the back to Messrs. Fraser, Trenholme & Co. It is without date or signature, and may have been kept as a copy. Of these facts no explanation has been offered even in argument.

In what relation Fraser, Trenholme & Co. stood to John Fraser & Co. does not appear by any satisfactory evidence. Of all the witnesses, Libby probably knows the most concerning them. He says in his deposition that he was consigned to Fraser, Trenholme & Co., and that he supposes that they had a power of attorney, to sell the vessel.

By the ship's papers, Applebee appears to have been the master. But this same Captain Libby, who sailed in her nominally as a passenger, actually took the command as soon as she left Liverpool, and acted as master until she came in sight of the U. S. gunboat *Quaker City*, when Applebee became the acting commander. This is shown by the testimony of several of the crew, and particularly that of Sanderson, the mate, who also testifies that Applebee informed him that he, Applebee, was to act as mate until they reached Nassau. Indeed, it is not now controverted that Libby did, to some extent, act as master of this vessel after she left Liverpool. How is this to be accounted for if neither Libby nor his former employers had any interest in the vessel?

Here was a British master with a mate and a majority of the crew British, on board a vessel sailing from one British port to another, permitting a foreigner to take the command of the vessel, who, according to some of the testimony, exercised it with a high hand. Captain Applebee in other parts of the case does not seem to have been of a pliable or submissive disposition.

When this vessel was boarded from the *Quaker City*, and he was directed to go on board that ship, he drew a pistol and threatened to shoot the first man who should attempt to enforce that order, and this while he was under the guns of the man-of-war.

Among the papers found on board is a bill in favor of a block and mast maker, for various articles, at various dates, from the 22d of April to the 14th of May, the day before her sailing, amounting

to £48. This bill is against Captain Libby and owners of brig *Lilla*.

It is well known that the military and other wants of the South have in a great measure been supplied from Great Britain, by the way of the West Indies, and especially through the port of Nassau. This trade, so detrimental to us, must, of course, be watched with jealous scrutiny by our cruisers. If, therefore, Fraser & Co., having this vessel at Liverpool, intended to send her to Nassau, they would seek the cover of some neutral flag, and none would be so convenient or safe as the British. There is evidence tending to show that that firm had a steamer at Liverpool called the *Scotia*, which was to follow the *Lilla* to Nassau, and there take her cargo and Libby on board for Charleston. If the *Scotia* should leave Liverpool with a full cargo, the coal consumed in crossing the Atlantic would leave a considerable capacity to be filled at Nassau. On the other hand, if an English merchant were disposed to engage *bona fide* in trade from Liverpool to Nassau, he would hardly select or employ a vessel of the antecedents of the *Mary Wright*, and employ her former master, Libby. Both must have become notorious by the previous capture and running the blockade, and liable to be recognized by a boarding-officer from an American man-of-war.

It is quite improbable that a British merchant carrying on a legitimate trade, would unnecessarily have encumbered it with these suspicious circumstances, which might subject it to interruption, and cause the vessel and cargo to be sent in for investigation.

Nor is this all. It has already been stated that Hewetson's part of the cargo was covered by the name of this claimant, R. G. Bushby. In his examination before the prize commissioners, Hewetson stated that he had his bills of lading in his trunk. They have never been seen by the prize master or commissioners. Hewetson further stated that the bill of lading which was found on board and is marked No. 10, is a copy of his bills of lading, and that it has upon it the initials both of his name and that of his son-in-law: that he never knew R. G. Bushby, and does not know how this bill of lading came to be made out in his name. He further states that he paid the freight of his shipment in advance, that they would not take it on other terms. It thus appears that he did not contract with Bushby for the carriage of his goods, but with some other persons who required the freight in advance, and they, it must be presumed, caused his goods to be covered by a bill of lading and freight list in the name of this claimant. This unquestionable fact that the name of Bushby was used to cover enemy's property belonging to Hewetson, must at least inflame every presumption arising from the evidence that his name was also used to cover the vessel. If a neutral owner of a portion of the property claims

another part which belongs to an enemy for the purpose of deceiving the court, the part belonging to the neutral will be condemned, as a penalty for his fraudulent conduct. The *St. Nicholas*, 1 Wheat. 431; the *Betsy*, 2 Gal. 385; the *Graaf Bernstorff*, 3 Rob. 111; in the *Eenrom*, 2 Rob. 1, a portion of a cargo belonging to a neutral was condemned because he had documented in his own name another portion belonging to an enemy, for the purpose of deceiving belligerent cruisers, and with the evident intention of claiming it as his own before a Prize Court, although that intention was never carried into effect, and his claim actually embraced only his own property. There is no doubt that enemy's goods were documented in the name of the claimant Bushby for the purpose of deceiving the cruisers of the United States. I am not under the necessity of deciding what would have been the effect of this masking of enemy's property if it were the only circumstance adverse to this claim, because there are other stringent facts against it. The only letter of advice found on board this vessel was one from R. G. Bushby to Adderley & Co., at Nassau. It is as follows:—

"LIVERPOOL, May 15, 1862.

"Messrs. Henry Adderley & Co., Nassau:

"Dear Sirs—This will be handed to you by Capt. Applebee, of my brig '*Lilla*,' leaving this for your port to-day; and whom I have directed to report himself on his arrival to your good selves and to confer with you as to the disposition of the cargo.

"Further instructions will follow by the Nassau mail, leaving this in about three weeks, which will most probably anticipate the present and the arrival of the vessel with you. In the meanwhile, hoping for a safe and speedy for Captain A.

"Your dear sirs,

"Yours faithfully,

"R. G. BUSHBY.

These were the only instructions found on board either as to vessel or cargo. They are certainly remarkable for abstinence and reserve. Not one word as to what is to be done, either with the vessel or goods on board. The writer merely informs his correspondents that the master will confer with them as to the disposition of the cargo, and that further instructions will follow by the Nassau mail. But why did not the instructions accompany the vessel and cargo? They would then be sure to be at Nassau the moment they were wanted. The mail which was to follow would be subject to all the contingencies of a sea voyage and might be long delayed, or never reach its destination. If there had been nothing to conceal, the plain course would have been to have sent letters of advice by this vessel and follow them afterwards by duplicates and

perhaps additions. If Libby was to control vessel or cargo on reaching Nassau, the peculiarities of this letter of advice may be accounted for. It might serve to give to a boarding officer the appearance of a letter of instructions, when in fact none were given. In the *Flying Fish*, 2 Gal. 375, there were no invoices or letters of advice on board, and it was said that they were transmitted by land. Judge Story held that "this, if true, affords an irresistible presumption of the hostile character of the cargo."

I am at this moment dealing only with the claim to the vessel, as to which the want of instructions to a correspondent abroad would not ordinarily create the same presumptions as in the case of the cargo. But R. G. Bushby does not appear merely in the character of a ship-owner carrying goods with which he has no concern. He was ostensibly the shipper and owner of a part of the cargo, and his name was used to cover a portion belonging to Hewetson; he had, or pretended to have, correspondents at Nassau, and directed his master to confer with them respecting the cargo; and he wrote the only letter of advice. His reserving all real information or instructions for some other channel of conveyance, is such evidence of designed concealment as must greatly prejudice any claim he may present.

A full hearing has been had upon the preparatory evidence at which some views were expressed by the court. The counsel for the claimant has since filed a motion for an order for further proof.

The admission of further proof rests wholly in the discretion of the court. But the exercise of that discretion is aided by certain rules. Further proof is admitted to remove doubts, not to create them. If the preparatory evidence present a clear case of enemy's property, the court will not hear further proof. But even if the case be doubtful, a party may forfeit all claim to the indulgence of further proof by bad faith. The *Alexander*, 1 Gal. 532—536—8; The *Dos Hermanos*, 2 Wheat. 80. *Mala fides* and attempts to deceive have been held sufficient grounds for refusing further proof. The *Juffrouw Anna*, 1 Rob. 126; 1 *Wheat.* 505; *Graaff Bernstorff*, 3 Rob. 117; The *Betsy*, 2 Gal. 385. If the difficulties do not admit of a fair and satisfactory explanation, if they are out of the reach of any rational solution, further proof will be refused. The *Vrouw Hermina*, 1 Rob. 163.

Under these rules, it would be difficult for the court to grant a motion for further proof in this case, however sustained. Still I have been willing to hear this motion and the affidavits in support of it, that I might see what evidence the party expects to produce. The motion is sufficiently general. It requests permission to prove that Bushby was a *bonâ fide* purchaser for a good consideration. In support of this motion, were affidavits by the proctor of the claimant, by Applebee, the master, and by Harris, one of the firm

of Adderley & Co., at Nassau, and a letter from Bushby to his proctor. The great question is whether Bushby was a *bonâ fide* purchaser for value, and for his own use. This question the affidavits and the letter can hardly be said to touch. They exhaust themselves upon other topics, viz., in showing that this vessel was regularly documented in the name of Bushby, and was really bound to Nassau, and not to the Southern States, points not relied upon by the captors, and not requiring further proof. The affidavit of Applebee re-affirms the statement made in his primary examination, that he was employed by Bushby, and hired the crew. He states his introduction to Bushby, and that he did not know of any other owner. But how Bushby came to be owner, for whose benefit he held the legal title, whether he paid any consideration, he does not state. Of all this he says nothing: nor does he explain why Fraser, Trenholme & Co. paid the advance wages to the crew, and says that he does not know why their names were put into the shipping articles as managing owners. The affidavit of Harris merely gives a letter under date of 7th of June, from Bushby to Adderley & Co. This letter requests that after the discharge of the outward cargo, they will assist the captain in obtaining a homeward cargo to such port in the United Kingdom as they shall consider most advantageous for the ship, and to be advised thereof.

So far as the vessel is concerned, this letter goes to supply the defect of that previously sent by Applebee, and repels the inference that no instructions were ever given in the name of Bushby. The bearing of this letter upon the cargo will be considered hereafter.

It seems, from Harris's affidavit, that Bushby was not a person previously known to his firm.

He says they received from a certain R. E. Bushby the letter hereto annexed. The claimant's name is R. G.; here the initial E. is substituted for the true one, G., a mistake not likely to have occurred as to a known correspondent.

The affidavit of Mr. Thomas, the proctor, states that he wrote to Mr. Bushby, informing him that the papers were sealed up, and inquiring if the vessel and cargo were in fact bound to Nassau, and if his vessel was duly documented, and his papers in order on board. The answer of Bushby, dated 23d of August, is produced, and states that the vessel was really bound to Nassau, and that he is ready to make affidavit of that fact, and that the vessel was duly documented, and the papers on board were in order. He does not speak of his title to the vessel, or say whether he paid any consideration, or whether he holds her for his own use, or for the benefit of others. Upon these topics this letter, and, for ought appears, that of the proctor, to which it is an answer, are wholly silent. The correspondence and the affidavits are quite unsatisfactory.

They say nothing of the purchase or title of the vessel, and do not state that either of the affiants has any expectation or belief that evidence can be produced of the payment of any consideration by Bushby, or that he holds the vessel for his own benefit. There is no reason to suppose that any further evidence of value can be produced.

The second objection to this claim is also fatal. There is no doubt that this vessel was the property of Maxwell and others, until her capture by a confederate privateer. But it is contended that she has since been condemned and sold by a Prize Court in Charleston, S. C., and the purchasers conveyed her to the claimant Bushby. If this were so, of which there is no sufficient proof, still such proceedings would not divest the title of the original owner. In the case of the *Amy Warwick*, this court held that treating the Confederates in some respects as belligerents, was not an abandonment of sovereign rights, and by no means precluded us from treating them in other respects as rebels. Most assuredly I shall not recognize the Southern Confederates as a nation, or as having a government competent to establish prize courts. No proceedings of any such supposed tribunals can have any validity here, and a sale under them would convey no title to the purchaser, nor would it confer upon him any right to give a title to others. But it is argued that, under the Queen's proclamation, recognizing the confederates as belligerents, a British Court would hold a sale to be valid. What the decision of a British Court might be upon that question we do not know, it never having been there litigated. But such a decision, if made, would be no more binding upon our courts than the political views of the British government would be upon the President or the Congress.

If this second objection were the only matter before the Court, it is questionable whether I ought to entertain or listen to it.

If this vessel had been arrested on the ocean, without any reason for supposing she was enemy's property, or infringing belligerent rights of the United States, but merely to settle a contested title between a citizen of the United States, and a neutral subject, this Court would perhaps refuse to go into the question of title, and at once restore the vessel to the person from whose possession she had been thus wrongfully taken. A due regard to the peace of the world might require that in questions of property between citizens of different nations, the court of one of such nations should not acquire jurisdiction by the wrongful exercise of force upon the ocean. But such is not the posture of this case. There has been no improper exercise of force. There was abundant reason for taking this vessel as enemy's property, and bringing her in for adjudication. She is rightfully within this jurisdiction, and if not condemned as prize, the court should deliver her to the person

having the highest title. If, indeed, the question of ownership were wholly between foreigners, the court might refuse to decide it, as we are not bound to exercise jurisdiction merely to settle controversies between foreigners. But we cannot refuse to listen to the claims of our own citizens to property legitimately within our jurisdiction.

The motion for further proof must be refused, and the claim of R. G. Bushby be dismissed, and the vessel restored to the claimants, Maxwell and others, upon what conditions will be stated hereafter.

I now proceed to the claim of Bushby & Co. to the cargo, made through Applebee, the master.

This claim embraces all the cargo except what belongs to Hewetson. The only documents found on board tending to show the ownership of the cargo are the freight list and bills of lading. These concur in representing that there were five different shippers, namely: John Senier & Co., Bushby & Co., R. G. Bushby, J. Perrin, Son & Co., and Henry Lafone.

There is nothing in the evidence to connect these claimants, Bushby & Co., with any part of the cargo, except that shipped in their own name. As to all the shipments, therefore, which appear by the papers to have been made by other persons, this claim must at once be dismissed. The freight list states that Bushby & Co., were the shippers of two parcels of saltpetre, one of 634 bags, and the other of 702 bags, consigned to order. All the other shipments are also consigned to order. The bills of lading all correspond with the freight list, both in the names of the shippers, kinds and qualities of goods shipped, and stating that they are to be delivered to order.

There are two bills of lading, in which Bushby & Co., are the shippers of the above named quantities of saltpetre, and to be delivered to order. On each bill the name of Bushby & Co., is endorsed in blank, and then erased by a line drawn through it.

There are four bills of lading in favor of John Senier & Co., all endorsed in blank. The other bills of lading, viz.: four in the name of R. G. Bushby, one in favor of J. Perrin, Son & Co., and one in favor of Henry Lafone have no endorsement upon them.

From the documents, there is as much reason to suppose that the several shippers who have made no claim were the owners of the goods documented in their name, as that these claimants were the owners of those shipped in their name. It does not appear to whom any of them were consigned.

No letter of advice or instructions accompanied the cargo except that already mentioned from R. G. Bushby to Adderly & Co., and that letter, as we have seen, merely said that the master would confer with them respecting the cargo, and that instructions would be sent by mail. This was most extraordinary. Why were not in-

structions sent with the cargo, rendering it certain that they would arrive when needed? Why kept back for a mail steamer, which might be delayed, or never reach its destination?

The case of the *Flying Fish* has already been referred to, in which Judge Story says, "that if no papers accompany the cargo, but they are sent by land, it creates an irresistible presumption of hostile property."

Here some papers accompanied the cargo, but they gave no information as to the consignee, or the disposition to be made of the goods. All this was reserved for a conveyance more safe from search and inspection. Even the letter that did accompany the goods, such as it was, was written only by R. G. Bushby, one of the apparent shippers and ostensible owner of the vessel. Neither these claimants nor any other shipper sent any instructions or communication whatever. Nor does it appear that they have ever done so, either to any person at Nassau, or to any agent or proctor conducting this cause.

A motion has been filed for further proof in relation to the cargo.

This motion is by, and in the name of the proctor. It states that said shippers, John Senier & Co., and Bushby & Co., and R. G. Bushby, and J. Perrin, Son & Co., and Henry Lafone have ever been, and still are the *bonâ fide* shippers and owners of the cargo, each in the proportion standing in their names in the freight list on file. No claim has been made by or in behalf of any of the shippers except Bushby & Co. and Hewetson. For these Applebee, the master, intervened, stating that he was informed and believes that a passenger was the owner of a part, and Bushby & Co. of all the rest of the cargo. And this was supported by his test affidavit. The proctor now, in his motion, asserts that each and every shipper was the owner of all the goods shipped in his name; thus declaring that Bushby & Co. never owned any part of the cargo except the saltpetre above mentioned. In the freight list R. G. Bushby is the shipper of 600 boxes of soap and 1137 coils of rope and other articles. In his letter of the 23d of August, this same R. G. Bushby, after speaking of the vessel, says, with reference to the cargo, this does not belong to me, but was shipped by various parties, and, as ship-owner acting for the interest of all concerned, I approve of the course determined upon with the saltpetre. Here is a distinct disclaimer of the ownership of the cargo without reservation of any part.

He undertakes, merely as ship-owner, to sanction the sale made at Boston of the saltpetre. Where are Messrs. Bushby & Co., of Liverpool, the alleged owners of the saltpetre? Why were they not consulted? If they have any real interest in the matter, why have they not been heard from, either directly or indirectly, since the commencement of these proceedings? We do not learn that they

have, up to this moment, ever made any communication whatever to any person, either at Nassau or Boston, in relation to this cargo. All that has been written respecting it has been by R. G. Bushby. His letter of the 15th day of May, to Adderley & Co., stated that further instruction would be sent by the Nassau mail. By the affidavit of Harris it appears that a subsequent letter was sent dated the 7th of June, giving some instructions as to the vessel, but not a word as to the cargo shipped at Liverpool. Nor does it appear that any one of the ostensible shippers has ever made any consignment, order or communication, or manifested any interest respecting the cargo.

The affidavits in support of this motion do not set forth any further evidence in support of this claim, or state any facts from which it may be inferred that any such exists. Indeed not one of the affiants states that he expects or believes that any such further proof can be produced. The difficulties which encompass this claim seem not to admit of any rational solution. No explanation, in any degree satisfactory, has been offered, and there is no reason to suppose that any further material evidence can be obtained.

The motion for further proof must be refused, and the claim made on behalf of Messrs. Bushby & Co. dismissed, and the cargo condemned.

To prevent misapprehension, I think proper to say that I do not question that trade may be lawfully carried on between one neutral port and another, even in goods contraband of war. However detrimental may be the bringing of such articles to the immediate vicinity of the enemy's country so as to facilitate the running of the blockade, still, if the voyage is really to terminate at a neutral port, it cannot be interrupted. But if it is not to end there,—if the actual destination be to the enemy's country, to touch only at the neutral place for the purpose of facilitating the enterprise by concealing the destination as far as possible, then the voyage may be treated according to its true character, as one to an enemy's port. But that inquiry is unnecessary here. My decision rests entirely upon other grounds.

It remains only to determine upon what conditions the vessel shall be restored to Maxwell and others.

By Statute 1800, chapter 14, section 1, it is provided that when a merchant vessel, belonging to any person under the protection of the United States, shall have been taken by a public enemy and shall be recaptured by a public armed ship of the United States, such vessel not having been condemned by competent authority before the recapture, the same shall be restored to the former owners upon payment of one-eighth part of the true value, for and in lieu of salvage. The language of this statute is perhaps in strictness applicable only to captures in an international war. But the analogy is so

close that I think it most proper to adopt the rule therein prescribed in the present case. By the 4th section of the Statute, the whole of such salvage is to go to the captors. I shall order restoration of the vessel to Maxwell and others upon payment to the captors of one-eighth part of the value thereof, and of all costs and expenses which they have incurred on account of the vessel.

R. H. Dana, jr., for the captors; F. C. Loring, for Maxwell and others, the American claimants; C. G. Thomas for R. G. Bushby and others, the British claimants.

Supreme Judicial Court of Massachusetts.

Benjamin Dean and Another *v.* American Mutual Life Insurance Company.[1]

Self-destruction committed by a person who understood the nature of the act and intended to take his own life, though committed during insanity, avoids a policy of life insurance, which provides that it shall be void if the assured shall die by his own hand.

Contract by the administrators of Jonathan H. Cheney, upon a policy of life insurance by which the defendants insured his life in the sum of $5000. The policy contained the following proviso: "And it is further provided, and this policy is granted and accepted upon the express terms and conditions that, if the said J. H. Cheney shall die by his own hand, or in consequence of a duel, or by the hands of justice, or in the known violation of any state, national or provincial law, the same shall be null, void and of no effect."

The parties agreed, in this court, that Cheney did cause his own death, by cutting his throat with a razor. The plaintiffs, however, alleged and offered to prove that the act whereby his death was caused was the direct result of insanity, and that his insanity was what is called suicidal depression, impelling him to take his life, and that suicide is the necessary and direct result of such insanity or disease.

The Chief Justice reserved the case for the determination of the whole court.

J. G. Abbott and *B. Dean*, for the plaintiffs. 1. The whole object of taking the policy was, to provide for a pecuniary payment in case of death by disease or accident. The proviso was intended to meet the case of a voluntary self-destruction by a reasonable being. Its object was to bring the fact distinctly to the attention of the assured, that if he should take his life voluntarily, while in possession of his reason, his representatives would lose the benefit of the

[1] This case will appear in 4 Allen, 96.

policy. 2. The disease of insanity was as much the cause of Cheney's death, as disease in a case of fever. It is not correct to say that death was caused by his hand. The cause of death was disease. Under the construction contended for by the defendants, that intelligent will is not required, the policy would be void if his hand were guided by the superior force of another. In the present case, the will was overpowered by disease; in the case supposed, by superior force from without. In neither case is it his act. The rule would be the same, if in a fit of somnambulism he had thrown himself from a window, or met his death by the accidental discharge of a pistol in his own hands. The true meaning and construction of the proviso is this: the contract is made with an intelligent and reasonable being, who is responsible for his acts; and it cannot be avoided except by the act of the same reasonable and responsible being. 3. This appears also from the context. The other conditions of forfeiture depend on a criminal violation of law. 4. The point has been decided in favor of the plaintiffs in New York. *Breasted* v. *Farmers' & Loan Trust Co.* 4 Hill (N. Y.), 74. In the English cases, where the contrary doctrine has been held, the opinions were not unanimous, and were strictly confined to the precise cases presented.

C. B. Goodrich and *H. A. Scudder*, for the defendants, cited, in addition to cases cited in the opinion, Addison on Con. 600; *Amicable Society* v. *Bolland*, 4 Bligh (N. S.) 194, and 2 Dow & Clark, 1; *Cook* v. *Black*, 1 Hare, 390; *Moore* v. *Woolsey*, 4 El. & Bl. 243; *Vyse* v. *Wakefield*, 6 M. & W. 442.

Bigelow C. J.—There can be no doubt that the facts agreed by the parties concerning the mode in which the assured destroyed his own life bring this case within the strict letter of the proviso in the policy, by which it was stipulated that it should be void and of no effect if the assured should "die by his own hand." The single question, therefore, which we have to determine is, whether, on the well settled principles applicable to the construction of contracts, we can so interpret the language of the policy as to add to the proviso words of qualification and limitation by which the natural import of the terms used by the parties to express their meaning will be so modified and restricted that the case will be taken out of the proviso, and the policy be held valid and binding on the defendants. In other words, the inquiry is, whether the proviso can be so read that the policy was to be void in case the assured should die by his own hand, he being sane when the suicide was committed. If these or equivalent words cannot be added to the proviso, or if it cannot be held that they are necessarily implied, then it must follow that the language used is to have its legitimate and ordinary signification, by which it is clear that the policy is void.

In considering this question, we are relieved of one difficulty

which has embarrassed the discussion of the same subject in other cases. If the proviso had excepted from the policy death by "suicide," it would have been open to the plaintiffs to contend that this word was to have a strict technical definition, as meaning in a legal sense an act of criminal self-destruction, to which is necessarily attached the moral responsibility of taking one's life voluntarily, and in the full exercise of sound reason and discretion. But the language of the proviso is not necessarily limited by the mere force of its terms. The words used are of the most comprehensive character, and are sufficiently broad to include every act of self-destruction, however caused, without regard to the moral condition of the mind of the assured, or his legal responsibility for his acts.

Applying, then, the first and leading rule by which the construction of contracts is regulated and governed, we are to inquire, what is a reasonable interpretation of this clause, according to the intent of the parties. It certainly is very difficult to maintain the proposition that, where parties reduce their contract to writing, and put their stipulations into clear and unambiguous language, they intended to agree to anything different from that which is plainly expressed by the terms used. It is, however, to be assumed that every part of a contract is to be construed with reference to the subject-matter to which it relates, and with such limitations and qualifications of general words and phrases as properly arise and grow out of the nature of the agreement in which they are found. Giving full force and effect to this rule of interpretation, we are unable to see that there is anything unreasonable or inconsistent with the general purpose which the parties had in view in making and accepting the policy, in a clause which excepts from the risks assumed thereby the death of the assured by his own hand, irrespective of the condition of his mind, as affecting his moral and legal responsibility at the time the act of self-destruction was consummated. Every insurer, in assuming a risk, imposes certain restrictions and conditions upon his liability. Nothing is more common than the insertion, in policies of insurance, of exceptions by which certain kinds or classes of hazards are taken out of the general risk, which the insurer is willing to incur. Especially is this true in regard to losses which may arise or grow out of an act of the party insured. Such exceptions are founded on the reasonable assumption that the hazard is increased when the insurance extends to the consequences which may flow from the acts of the person who is to receive a benefit to himself or confer one on others by the happening of a loss within the terms of the policy. Where a party procures a policy on his life, payable to his wife and children, he contemplates that, in the event of his death, the sum insured will enure directly to their benefit. So far as a desire to provide in that contingency for the

welfare and comfort of those dependent on him can operate on his mind, he is open to the temptation of a motive to accelerate a claim for a loss under the policy by an act of self-destruction. Against an increase of the risk arising from such a cause, it is one of the objects of the proviso in question to protect the insurers. Although the assured can derive no pecuniary advantage to himself by hastening his own death, he may have a motive to take his own life, and thus to create a claim under the policy, in order to confer a benefit on those who, in the event of his death, will be entitled to receive the sum insured on his life. Unless, then, we can say that such a motive cannot operate on a mind diseased, we cannot restrict the words of the proviso so as to except from the risk covered by the policy only the case of criminal suicide, where the assured was in a condition to be held legally and morally responsible for his acts. It certainly would be contrary to experience to affirm that an insane person cannot be influenced and governed in his actions by the ordinary motives which operate on the human mind. Doubtless there may be cases of delirium or raving madness where the body acts only from frenzy or blind impulse, as there are cases of idiocy or the decay of mental power, in which it acts only from the promptings of the lowest animal instincts. But, in the great majority of cases where reason has lost its legitimate control, and the power of exercising a sound and healthy volition is lost, the mind still retains sufficient power to supply motives and exert a direct and essential control over the actions. In such cases, the effect of the disease often is to give undue prominence to surrounding circumstances and events, and, by exaggerating their immediate effects or future consequences, to furnish incitement to acts of violence and folly. A person may be insane, entirely incapable of distinguishing between right and wrong, and without any just sense of moral responsibility, and yet retain sufficient powers of mind and reason to act with premeditation, to understand and contemplate the nature and consequence of his own conduct, and to intend the result which his acts are calculated to produce. Insanity does not necessarily operate to deprive its subjects of their hopes and fears, or the other mental emotions which agitate and influence the minds of persons in the full possession of their faculties. On the contrary, its effect often is to stimulate certain powers to extraordinary and unhealthy action, and thus to overwhelm and destroy the due influence and control of the reason and judgment. Take an illustration. A man may labor under the insane delusion that he is coming to want, and that those who look to him for support will be subjected to the ills of extreme poverty. The natural effect of this species of insanity is to create great mental depression, under the influence of which the sufferer, with a view to avoid the evils and distress which he imagines to be impending over himself and those who are depen-

dent upon him for support, is impelled to destroy his own life. In such a case, suicide is the wilful and voluntary act of a person who understands its nature, and intends by it to accomplish the result of self-destruction. He may have acted from an insane impulse, which prevented him from appreciating the moral consequences of suicide; but nevertheless he may have fully comprehended the physical effect of the means which he used to take his own life, and the consequences which may ensue to others from the suicidal act. It is against risks of this nature—the destruction of life by the voluntary and intentional act of the party assured—that the exception in the proviso is intended to protect the insurers. The moral responsibility for the act does not affect the nature of the hazard. The object is to guard against loss arising from a particular mode of death. The *causa causans*, the motive or influence which guided or controlled the will of the party in committing the act, is immaterial, as affecting the risk which the insurers intended to except from the policy. This view is entirely consistent with the nature of the contract. It is the ordinary case of an exception of a risk which would otherwise fall within the general terms of the policy. These comprehended death by disease, either of the body or brain, from whatever cause arising. The proviso exempts the insurers from liability when life is destroyed by the act of the party insured, although it may be distinctly traced as the result of a diseased mind. It may well be that insurers would be willing to assume the risk of the results flowing from all diseases of the body, producing death by the operation of physical causes, and yet deem it expedient to avoid the hazards of mental disorder, in its effects on the will of the assured, whether it originated in bodily disease or arose from external circumstances, or was produced by a want of moral and religious principle.

It was urged very strongly, by the learned counsel for the plaintiffs, that this view of the construction of the contract was open to the fatal objection, that it would necessarily lead to the absurd conclusion, that death, occasioned by inevitable accident or overpowering force, or in a fit of delirium or frenzy, if the proximate and immediate cause was the hand of the person insured, would be excepted from the risks assumed by the defendants. But this objection is sufficiently answered by the obvious suggestion, that such an interpretation, although within the literal terms of the proviso, would be contrary to a reasonable intent, as derived from the subject-matter of the contract. An argument having for its basis a *reductio ad absurdum* is not entitled to much weight, when it is necessary to ascertain the intention of the parties to a contract, and to conform to that intention in giving an interpretation to the language used. Indeed, when it becomes necessary (as the case on the part of the plaintiffs requires) to desert the literal import of terms adopted by

parties to express their meaning, as it cannot be reasonably supposed that they intended to enter into stipulations which would be unreasonable or absurd, all conclusions which tend to establish such a result are necessarily excluded. The question in such cases is not, how far can the literal meaning of words be extended; but, what is a reasonable limitation and qualification of them, having regard to the nature of the contract and the objects intended to be accomplished by it. Applying this principle to the present proviso, and assuming that the plaintiffs are right in their position, that the words used are not to be interpreted literally, it would seem to be reasonable to hold that they were intended to except from the policy all cases of death caused by the voluntary act of the assured, when his deed of self-destruction was the result of intention, by a person knowing the nature and consequences of the act, although it may have been done under an insane delusion, which rendered the party morally and legally irresponsible, incapable of distinguishing between right and wrong, and which, by disturbing his reason and judgment, impelled him to its commission. If the suicide was an act of volition, however excited or impelled, it may in a just sense be said that he died by his own hand. But beyond this, it would not be reasonable to extend the meaning of the proviso. If the death was caused by accident, by superior and overwhelming force, in the madness of delirium, or under any combination of circumstances from which it may be fairly inferred, that the act of self-destruction was not the result of the will or intention of the party adapting means to the end, and contemplating the physical nature and effects of the act, then it may be justly held to be a loss not excepted, within the meaning of the proviso. A party cannot be said to die by his own hand, in the sense in which those words are used in the policy, whose self-destruction does not proceed from the exercise of an act of volition, but is the result of a blind impulse, of mistake or accident, or of other circumstances over which the will can exercise no control.

In seeking to ascertain the intention of parties, some weight is to be given to the practical results which would be likely to follow from the adoption of a particular construction of the words of a contract. It is reasonable to suppose that these were in contemplation of the insurers, at the time the policy was issued. Certainly it is fair to infer that they intended to put some material limitations upon their liability by the insertion of this proviso. But if it is to be construed as including only cases of criminal self-destruction, it would rarely, if ever, effect this object. Those familiar with the business of insurance and with the results of actions on policies of insurance in courts of law know how difficult it is to establish a case of exemption from liability under an exception in a policy, where it depends on a question of fact to be decided by the verdict of a jury. If

this is true in regard to ordinary claims under policies, it is obvious that the difficulty would be greatly enhanced in cases like the present, where it would be sufficient, in order to take a case out of the operation of the proviso, to prove that self-destruction was the result of insanity. It would not be hazardous to affirm that, in all cases where such an issue was to be determined by a jury between an insurance company and the representatives of the deceased, the act of suicide would be taken as proof of insanity. Such considerations were not likely to have escaped the attention of practical men in framing this general proviso; and, in a doubtful case of construction, they are not to be overlooked in giving an interpretation to the words used by them.

The learned counsel for the plaintiffs have insisted with great force on an argument drawn from the context, to show that the proviso was intended to embrace only a case of criminal self-destruction by a reasonable and responsible being. But it seems to us that the maxim *noscitur a sociis*, on which they rely, does not aid the construction for which they contend. The material part of the clause is, that the policy is to be void if the assured "shall die by his own hand, or in consequence of a duel, or by the hands of justice, or in the known violation of any state, national, or provincial law." Now the first and most obvious consideration suggested by other parts of this clause is, that in enumerating the causes of death which shall not be deemed to be within the risks covered by the policy, one of them is in terms made to depend on the existence of a criminal intention. It is a "known" violation of law which is to avoid the policy. This tends very strongly to show that where an act producing death may be either innocent or criminal, if it is intended to except only such as involves a guilty intent, it is carefully so expressed in the proviso. The inference is very strong, that, if they designed to confine the exception in question to cases of criminal suicide, it would have been so provided in explicit terms. So far the argument drawn from the context does not support the plaintiffs' claim. Take then another of the causes of death, death in a duel, enumerated in the proviso. It seems to us to be a *petitio principii* to assume that death in consequence of a duel necessarily implies an act for which the party would be criminally responsible. Why is not this part of the proviso open to the same argument as that which is urged in regard to the clause relating to self-destruction? A duel may be fought by a party acting under duress, or impelled thereto by an insane delusion, which might blind his moral perceptions and render him legally irresponsible. If so, then the same answer to a defence set up against a claim under the policy would be open under this clause, as this now urged in behalf of the plaintiffs; and the argument founded on the assumption that a forfeiture under this part of the proviso necessarily involves a criminal violation of law,

falls to the ground. Therefore the inference that a guilty intention is communicated from this branch of the proviso to that relating to death by the act of the assured, seems to us to be unfounded. The only remaining clause is that which provides for the case of death by the hands of justice. This undoubtedly implies that the person insured has been found guilty of a criminal act by a judicial tribunal according to the established forms of law. But it is not correct to say that it necessarily involves the existence of a criminal intent, because it might be shown that the conviction of the assured was erroneous, and that he was in fact innocent of the crime for which he suffered the penalty of death. So far, therefore, as any argument can be justly drawn from the connection in which the words as to self-destruction stand in relation to other parts of the proviso, it leads to the conclusion that it was not solely death occasioned by acts of the assured involving criminal intent, or a wilful violation of law by a person morally and legally responsible, which was intended to be excepted from the risks assumed by the insurers; but that, with the exception of death in a known violation of law, the proviso embraces all cases where life is taken in consequence of the causes specified, without regard to the question, whether at the time the assured was amenable for his act either *in foro conscientiæ* or in the tribunals of justice.

It may be added that a departure from the literal terms of a contract is always attended with great difficulty and danger, because it is apt to lead to great latitude of construction and to give uncertainty to the language which the parties have adopted to express their meaning. It certainly never should be extended beyond the clear intent of the parties, as derived from other parts of the agreement, or the subject-matter to which the contract relates. This position may be illustrated by reference to another part of the policy declared on. The proviso which precedes that on which the present question has arisen contains a stipulation that the policy shall be void if the assured without the consent of the defendants in writing shall during certain portions of the year visit the more southerly parts of the United States, or shall pass without the settled limits of the United States. If the assured, in a fit of insanity, should wander from his home and go within the prohibited territory, would the policy be void? If he was taken prisoner and went thither with his captors, would he lose his claims under the policy? These and similar questions, which might arise under other clauses of the policy, seem to show that it is more safe to adhere to the strict letter of the contract, and to hold parties to the salutary rule which requires them to express in clear and unambiguous terms any exceptions which they desire to engraft on the general words of a contract.

So far as the adjudicated cases bear on the question which we have

considered in the present case, the weight of authority is against the claims of the plaintiffs under the policy. In the case of *Borrodaile* v. *Hunter*, 5 Man. & Gr. 639, where the policy contained a proviso very similar to that found in the policy declared on, it was held that the policy was avoided, as the proviso included all cases of voluntary self-destruction, and was not limited to acts of criminal suicide. From this opinion there was a dissent by the chief justice. In *Clift* v. *Schwabe*, 3 C. B. 437, a similar decision was made by the exchequer chamber, two of the judges dissenting. These cases seem now to be regarded as having settled the law in England in conformity with the opinion of the majority of the judges. *Dufaur* v. *Professional Life Ass. Co.* 25 Beav. 602. A different opinion was arrived at in *Breasted* v. *Farmers' Loan and Trust Co.* 4 Hill, (N. Y.) 74, and 4 Selden, 299, from which, however, several of the most learned justices of the court of appeals dissented.

In 1 Phil. Ins. § 895, it is stated that any mental derangement sufficient to exonerate a party from a contract would render a person incapable of occasioning the forfeiture of a policy under a clause like the one in question. In support of this proposition no authorities are cited except the cases above named of *Borrodaile* v. *Hunter*, and *Breasted* v. *Farmers' Loan and Trust Co.*, as reported in 4 Hill. If it is intended by it to assert that the principle, on which a contract made with an insane person is held to be void as to him, applies to this clause so as to exclude from its operation all cases of self-destruction occasioned by insanity, it seems to us that the position is untenable. The reason for the rule which exempts a person from liability on a contract into which he entered when insane is, that he is not deemed to have been capable of giving an intelligent assent to its terms. But this rule is not applicable, where a contract is made with a person in the full possession of his faculties, and he, subsequently, in a fit of insanity commits a breach of it or incurs a penalty under it. He is then bound by it. His mind and will have assented to it. No subsequent mental incapacity will absolve him from his responsibility on it, unless from its nature it implies the continued possession of reason and judgment and the action of an intelligent will. A party may be liable on an unexecuted contract, after he has lost the use of his mental faculties, as he may be held responsible *civiliter* for his torts. *Bagster* v. *Portsmouth*, 7 D. & R. 614. *Weaver* v. *Ward*, Hob. 134. *Cross* v. *Andrews*, Cro. Eliz. 622. To say that insanity exonerates a party from a forfeiture under such a proviso in a policy, is to assume that this was the intention of the parties when the contract of insurance was entered into. But if such was not the intention, then it follows that the assured gave an intelligent assent to a contract, by which he stipulated that if he took his own life voluntarily, knowing the

consequences of his act, he would thereby work a forfeiture of his claim under the policy, although he may have acted under the influence of insanity in committing the suicidal act. So that, after all, we are brought back to the inquiry, what was the intention of the parties to the contract, in order to ascertain the true construction of the proviso.

The result to which we have come, after a careful and deliberate consideration of the question, during which we have felt most sensibly the very great difficulties and embarrassments which surround the subject, is, that the plaintiffs are not entitled to recover. The facts agreed by the parties concerning the mode in which the plaintiffs' intestate took his own life leave no room for doubt, that self-destruction was intended by him, he having sufficient capacity at the time to understand the nature of the act which he was about to commit, and the consequences which would result from it. Such being the fact, it is wholly immaterial to the present case that he was impelled thereto by insanity, which rendered him incapable of distinguishing between right and wrong, and legally irresponsible for his actions.

Plaintiffs nonsuit.

RECENT ENGLISH CASES.

THE INHABITANTS OF KINGSWOOD, *Apps.*, THE INHABITANTS OF BIRMINGHAM, *Resps.* — NOV. 16, 1861.

Evidence — Declarations by deceased person against interest — Oral statements.

The principle laid down in *Higham* v. *Ridgway*, 10 East 109 (1808), that entries made by a deceased person against his pecuniary interest are receivable to prove collateral facts, is applicable also to declarations cutting down the proprietary interest of the person making them; and there is no difference, for this purpose, between written and oral declarations.

Where, therefore, in order to prove the settlement of a pauper, a witness swore that the deceased father of the pauper made to him a verbal statement that he (the father) occupied a tenement in the parish sought to be charged, at a yearly rent of 20*l.*, such statement being made during the said occupation—*Held*, that the statement, being one which tended to cut down and explain the interest of the father in the tenement in his occupation, was admissible in evidence to prove the amount of the rent.

At the general quarter sessions of the peace holden in and for the borough of Birmingham, before M. D. Hill, Esq., Q. C., recorder of the said borough, on Monday, the 8th October, 1860, upon an appeal against an order of two justices of the peace for the said borough, dated the 9th August, 1860, whereby Sarah, the wife of

William Day (absent from her), and their four children, were ordered to be removed from the said parish of Birmingham to the said parish of Kingswood as their place of legal settlement, the court of quarter sessions quashed the said order, subject to the opinion of the Court of Queen's Bench upon the following case:—The respondents proved that John Lockyer Day, deceased, the father of the said William Day, had occupied a tenement from the year 1829 until his death in 1847, in the said parish of Kingswood, the rent for which was settled in account with the landlord, and was found by the Court to have been paid by the said John Lockyer Day. To prove the amount of that rent, evidence was tendered by the respondents, and objected to by the appellants' counsel, that the said John Lockyer Day, whilst in occupation of the said tenement, said to his son Thomas Day, that "he," the said John Lockyer Day, "occupied the same as tenant at a rent of 20*l.* per year." If this Court shall be of opinion that evidence of the declaration of the said John Lockyer Day is admissible for the purpose of proving the amount of rent and the nature of the occupation, then the order of quarter sessions is to be quashed, and the order of removal confirmed; otherwise the order of quarter sessions is to be confirmed, and the order of removal quashed.

O'Brien and *Cockle*, for the appellants.—Here it was necessary, to the settlement of the pauper in the appellant parish, to prove that his father occupied a tenement at the yearly rent of 10*l.*; and the question is, whether the case falls within the exception to the general rule, which excludes hearsay evidence. The statement of John Lockyer Day, if admissible as that of a deceased occupier in possession, tending to cut down and explain his estate, is, nevertheless, inadmissible to prove a collateral fact. [COCKBURN C. J.—According to *Higham* v. *Ridgway*, 10 East 109, a statement once admissible is admissible for all purposes.] To the same effect are the decisions in *Doe* v. *Robson*, 15 East 32, and *Davies* v. *Humphreys*, 6 M. & W. 153; but a distinction must be taken between cases where the interest is of a pecuniary nature and the present, where it is of a proprietary nature only. Declarations of the former kind are universally, and under all circumstances, receivable in evidence; in the latter class of cases a statement is admissible only when made while the declarant is in possession. In his judgment in *Davies* v. *Humphreys*, PARKE B. says, "Certainly, if this point were now for the first time to be decided, it would seem more reasonable to hold that a memorandum of a receipt of payment was admissible only to the extent of proving that a payment had been made, and the account on which it had been made, and that it would have the same effect only that proof by parol of like payment would have had." It is clear, therefore, that the principle is one which should not be extended. [COCKBURN C. J.—Here you

must treat the statement as though it had been in writing. BLACKBURN J.—Why should there be a difference in principle between an admission of a deceased person of the receipt of money and an admission against a proprietary interest? If you could establish a distinction between an oral and a written statement, it would help you more effectually.] In 1 Tayl. Ev. 564, it is said of declarations against proprietary interest, "In strictness, it would seem that they ought to be confined to the simple proof of the interest which the declarant enjoyed in the premises." [BLACKBURN J.—In *Baron de Bode's case*, 8 Q. B. 243, evidence was offered that the father of the Baron de Bode, while administering and governing the lands, &c., had declared that he did so for his son, and such declaration was held good evidence. COCKBURN C. J. referred to *Mountnoy* v. *Collier*, 1 El. & Bl. 630.] Then, *Chambers* v. *Bernasconi*, 1 C. M. & R. 347, one of another class of cases, is in point. [BLACKBURN J.—There the entry was not as against interest, but in the course of business.] [They also cited *Peaceable* d. *Uncle* v. *Watson*, 4 Taunt. 15; *Davies* v. *Pearce*, 2 T. R. 53; *Papendick* v. *Bridgwater*, 5 El. & Bl. 166; *Reg.* v. *The Inhabitants of Worth*, 4 Q. B. 132; *Doe* d. *Baggalley* v. *Jones*, 1 Camp. 366; *Holloway* v. *Rakes*, cited in 2 T. R. 55; and Stark. Ev. (note to *Davies* v. *Pearce*), 489].

Spooner and *Manley Smith*, for the respondents.—In *Doe* d. *Welsh* v. *Langfield*, 16 M. & W. 514, the principle is laid down, that "all statements made by a deceased person while in possession of property are in themselves original evidence, if they go to cut down his interest in it." Here it is contended, on the other side, that the amount of rent is a collateral fact, and that the declaration was, therefore, inadmissible to prove it. This argument is untenable; the statement is an absolute and entire one; and the question is disposed of by the judgment of PARKE B. in *Perceval* v. *Ranson*, 7 Exch. 4, where it is laid down, that where entries are so connected, the whole are admissible. The following passage in the judgment of LORD ELLENBOROUGH C. J., in *Doe* d. *Browne* v. *Rawlings*, 7 East 289, is also in point:—"The question, then, is, whether this declaration of the tenant for life, so circumstanced (for it is to be considered only as a declaration by him), as to the existing rent of the tenement in question, be evidence of that fact against a succeeding tenant for life of the estate, having a similar power of leasing, reserving the ancient rent, who claimed as a purchaser; for if he had derived title from the former tenant for life, by whom the indorsement was made, the case would have been quite clear; and we think it is also evidence against the defendant, who claims from a succeeding tenant for life." [They also cited *The Sussex Peerage case*, 11 Cl. & Fin. 113; *Carne* v. *Nicholl*, 1

Bing. N. C. 430; *Gleadow* v. *Atkin*, 1 Cr. & M. 410; and *Middleton* v. *Melton*, 10 B. & Cr. 317.]

COCKBURN C. J.—I am of opinion that the evidence in this case was properly received. It is well established that a declaration made by a person in the occupation of an estate, who holds as tenant, is admissible, after his decease, for the purpose of rebutting the presumption of law which arises, in the absence of evidence to the contrary, of an ownership in fee-simple by the occupier. The question here is, whether a declaration by a person, who thereby admits he is tenant only, and not the owner, of the fee, be admissible, not only for the purpose of showing an occupation of tenant, as distinguished from that of owner, but also as showing what, in point of fact, was the amount of rent he paid as tenant. It has been repeatedly held, in the analogous cases of declarations against pecuniary interest, that they are receivable to prove collateral facts; so far, at all events, as they relate to facts which are not foreign to such declarations, and so far as they may be taken to form a substantial part of the statement. That being so, I cannot see why, on principle, the same effect should not be given to declarations affecting the proprietary interest of the persons making them. It is true, that here the declaration is an oral one, and it has been said that statements of that kind do not stand upon the same footing with a written entry made in the course of business, as in the case of *Higham* v. *Ridgway;* but I am of opinion that there is no real difference between the cases, and that objections must apply to the force and effect, rather than to the admissibility, of such evidence, so long as the statement contains the necessary element of being against the interest of the party making it. It does not appear that the question now under consideration has been ever presented to the courts in precisely the same form as it is now presented; and the passage cited from the judgment of LORD ELLENBOROUGH in *Doe* d. *Browne* v. *Rawlings* seems hardly in point. *Peaceable* v. *Watson* is more like the present case. There the tenant stated, not only that he did not occupy as owner, but as tenant, but went on to state under whom he occupied; and in an action of ejectment to recover the premises, the declaration of the tenant was received for both purposes. I think, therefore, that the weight of authority is in favor of the proposition contended for on behalf of the respondents, and that the principle laid down in *Higham* v. *Ridgway* is applicable to this case.

BLACKBURN J.—I am of the same opinion. The question is, whether a statement made by a deceased occupier of property, in which he declares not only that he is tenant, but tenant at a yearly rent of 20*l*., is admissible after his death for the purpose of showing, as between strangers, what was really the amount of rent. The cases show, that when a person in occupation of real property makes

a statement which cuts down his interest, such statement is, after his decease, admissible in evidence; and it seems to me that it is immaterial whether such statement be a written one or by parol only. In *Baron de Bode's case* a verbal statement of the baron's father that he was acting for his son was held admissible, on the ground that the declaration was against the interest of the person making it. I do not find in any of the authorities cited any distinction taken between the one case and the other, and it seems to me that the probability of a person speaking the truth is the same whether the interest be a pecuniary or a proprietary one. Then, the admission of the declarant, in which he states that he is not the freeholder, but tenant at a rent of 20*l.*, is admissible for the purpose of proving that the rent paid was really 20*l.* It cannot, I think, be disputed, that if this were a written declaration, it would be evidence of all matters therein involved. There may be a marked distinction in the case of oral statements as compared with written ones, with respect to the weight to be attached to them; but the question here is not as to the weight, but as to the admissibility, of such declarations, which seems to me equal in either case, there being no authority to the contrary.—*Order of sessions quashed, and order of removal confirmed.*

SHAW *v.* SHAW.—Dec. 17, 1861.

Contempt—Threatening witnesses.

The respondent, during the pendency of a suit of divorce, called upon one of the intended witnesses for the petitioner, conducted himself with great violence, and used threats towards her:—*Held*, that he was guilty of contempt of the Court.

This was an application for a rule calling on Mr. Shaw, of Harley Street, St. Marylebone, house agent, to show cause why he should not be committed to prison for a contempt of the Court. Mrs. Shaw had filed a petition in this court praying that her marriage with the respondent should be dissolved, by reason of his adultery, coupled with cruelty. On the 26th November, 1861, whilst the suit was still in progress, the respondent called upon Maria Dowman, a material witness intended to be produced by the petitioner, who had formerly been in the service of the petitioner and the respondent, but at the time was living with another master, at the residence of the latter. According to the statement of Maria Dowman, the respondent, on seeing her, asked, in a loud tone, what she had to say against him? That she said "Nothing," and declined to answer further questions, unless in the presence of her master; that he then accused her of having unlawfully assisted his wife to remove goods from his house, and threatened to prosecute her; that in the course of the conversation she told him he had struck his

wife, upon which he called her a liar, and said he would indict her for perjury, and punish her. His conduct was so violent that she expected he would make a personal attack upon her. Mr. Shaw admitted he called upon the witness, but said his object was to obtain evidence on his own behalf. He also admitted that he reproached her for removing the goods; and further, he told her he would indict her for perjury if she did not speak the truth.

Bullar, for the petititioner.—If a suitor calls upon a witness, and threatens an indictment for perjury in case she should go before the Court to give evidence, he is guilty of a high contempt. [He referred to *Lechmere* v. *Charlton*, 2 My. & C. 318, and *Littler* v. *Thompson*, 2 Beav. 129.]

Deane, Q. C., and *Spinks*, for the respondent, admitted that he had been indiscreet, but he had not done any act for which he ought to be committed. In the cases cited the act had been done against the judge, the master, or a witness who had already made an affidavit. [Sir C. CRE SWELL.—Is there any real difference between threatening a party who has already become a witness, and one who it is known is about to be examined?] There is no evidence that Mr. Shaw was aware that Maria Dowman was to be a witness for the plaintiff.

Sir C. CRESSWELL.—If any communication is made to a witness with an intention of intimidating him in giving his evidence, it is a contempt of Court. I have no doubt the respondent went to see this servant with an intention of intimidating her. I think the purposes of justice will be answered if I order the respondent to pay the costs of this application.

HOLME *v.* CLARK AND ANOTHER.—April 24, 1862.

Practice—New trial—Surprise.

A party to a cause, who has not been called as a witness, cannot have a new trial on the ground of surprise, in regard to the effect of any conversation with himself at all events, if he admits some conversation to have occurred, and the effect of it is not necessarily decisive of the case.

This was an action against shipping agents for not taking due care of a yacht entrusted to them for sale.

The cause was tried at Winchester before BYLES J., and the principal piece of evidence was a letter from the defendants to the plaintiff stating their terms for "taking entire charge of the vessel," as well as their commission for the sale. A witness, however, was called to prove a conversation with the defendant, Clark, in which the latter stated that their duty would be to take down the masts and spars and send a man to look to the moorings, &c., the yacht then lying off Southampton. The negligence imputed was not

having taken down the masts and spars before or when a heavy gale came on, in which the yacht broke from her moorings and ran foul of another vessel. The defendant, with whom the conversation was had, was not present at the trial.

The learned judge told the jury that as the terms of the contract were not quite clear as to what taking charge of the yacht might mean, the conversation had been proved in order to clear up the doubt; and he left it to the jury on the whole case whether there had been neglect on the part of the defendants in not taking down the masts and spars or otherwise securing the ship. They found for the plaintiff: damages £500.

M. Smith, Q.C., now moved for a new trial on the ground of surprise, on an affidavit of the other defendant, who had not been present at the trial, to the effect that the terms of the conversation had been misrepresented, but he did not deny that some such conversation had taken place.

The COURT (POLLOCK C. B., MARTIN B., CHANNELL B. and WILDE B.) refused a rule, observing that if the conversation was material, the defendant—as he admitted that he had had some conversation on the subject — should have been present at the trial to state it; but that the agreement, as contained in the letter, was, in itself, sufficient to sustain the action; the substantial question upon it being, whether the defendants had neglected the duty arising out of their undertaking to "take the entire charge of the vessel."

Rule refused.

THE PRUSSIAN LAW OF MARRIAGE.

AN interesting trial was recently pending before the tribunals at Berlin. The validity of a marriage, contracted in 1848, between Count S—— and the daughter of a non-commissioned officer of the guard, who had been employed in the *corps de ballet* of the opera, was disputed on the ground of irregularity of rank. The superior tribunal of Berlin declared the marriage valid, acting upon a rescript of 1746, by which non-commissioned officers and their children are assimilated to the upper bourgeois class. But this judgment has been cancelled, and the cause sent back to be tried again. The defendant, the son of the Countess S——, pleads that his mother was a very skilful dancer; that she danced solos; that consequently she was an artist, and belonged, therefore, to the upper bourgeois class. Thus it is upon the question of whether this lady danced more or less cleverly that the validity of the marriage depends. The law upon marriage, presented so many times, suppressed this absurd distinction of ranks; consequently the Chamber of Peers has always refused to vote it.—*Solicitors' Journal*, vol. vii. p. 11.

[Continued from page 61.]

A DIGEST

Of all *the Cases Decided in the English Courts of Equity, from Michaelmas Term*, 1861, *to the Sittings after Trinity Term*, 1862, *both inclusive, as Reported in* Vol. X. *of* The Weekly Reporter, 1861–62, *or in other Legal Reports during the same period, together also with certain Cases Reported during the same period, but Decided previously thereto.*

*** In the following Digest the letters L.C. after the name of a case indicate LORD CHANCELLOR'S COURT; L.J., LORDS JUSTICES' COURT; L.C. & L.J., the FULL COURT of the LORD CHANCELLOR and LORDS JUSTICES; M.R., the MASTER OF THE ROLLS' COURT; V.C.K., the VICE-CHANCELLOR KINDERSLEY'S COURT; V.C.S., the VICE-CHANCELLOR STUART'S COURT; V.C.W., the VICE-CHANCELLOR WOOD'S COURT. The figures which follow these letters denote the page in The *Weekly Reporter*. Then follow references to other authorities where the case is reported.

EXECUTOR.

1. *Administration—Liability* de bonis propriis — *Priority.* — An executor, who makes himself liable for debts of the testator, has no priority in respect of such debts over the other creditors of the testator, but stands in the same position as the creditors for whose debts he has made himself liable. *Lucas* v. *Williams*, L.J. 677.

2. *Administration—Liability* de bonis propriis — *Promissory Note — Executor carrying on business.* — An executor while carrying on his testator's business, signed a promissory note *per proc.* in the name of the firm, for goods supplied during testatrix's lifetime.

Held, that the executor had made himself personally liable. *Lucas* v. *Williams*, V.C.S.; 3 Giff. 150; 8 Jur. N. S. 207.

3. *Administration—Executor carrying on business—Judgment against executor — Liability* de bonis propriis. — An executor while carrying on his testator's business, signed a promissory note *per proc.* in the name of the firm, for goods supplied during testator's lifetime. The Court made an administration decree, and several orders thereunder, by which the assets were withdrawn from his control. Subsequently, a creditor sued him on the note, and recovered judgment by default. The Court restrained the creditor from enforcing the judgment. *Lucas* v. *Williams*, V. C. S. 578.

4. *Administration—Bill given by executor—Liability* de bonis propriis.— Where an executor gives bills or incurs liabilities in respect of his testator's estate, and a suit is instituted for the administration of the estate, the Court will not by a motion in the suit restrain an action against the executor in respect of such bills or liabilities. *Lucas* v. *Williams*, L.J. 606.

5. *Appropriation of legacy—Loss by failure of bank—Liability of executor.* —Where an executor, after payment of certain immediate legacies, deposits in a bank a sum sufficient to meet certain deferred legacies, with a view to an investment on mortgage, and a loss occurs by the failure of the bank, which renders the remaining assets insufficient to meet the unpaid legacies—

Held, that the unpaid legatees must bear the loss, and could not call on the executor or the paid legatees to contribute.

Held also, that the executor was entitled to file a bill for the purpose of taking the account. *Fenwick* v. *Clarke*, L.J. 636; 6 L. T. N. S. 593.

6. *Contract.*—A contract not binding upon a testator will not be enforced against his estate after his decease, and the executor who had completed the purchase, which was alleged to have been negotiated by the testator's direction, and taken the conveyance in his own name after the testator's death, is not entitled to charge the purchase money upon the assets. *Inskip's case* (2), V.C.S.; 3 Giff. 359; 8 Jur. N. S. 256.

7. *Discretion—Testator's servants.*—Two months is not an unreasonable period for the exercise, by the executors, of their discretion as to discharging the testator's servants, there being no obligation, as soon as the testator is dead, at once to discharge all the servants. *Field* v. *Peckett* (3), M.R.; 29 Beav. 576.

8. *Liability under covenants of lease—Retrospective operation of* 22 & 23 *Vict. c.* 35.—A purchaser of leaseholds before the passing of the 22 & 23 Vict. c. 35, covenanted with the vendor to indemnify him against the covenants of the lease. The purchaser died, having bequeathed the leaseholds to his widow, whom he appointed his executrix. The widow having died,

Held, that the case was within the 22 & 23 Vict. c. 35, and that the executors of the widow might distribute the estate without setting aside any fund to provide against liability under the covenants. *Re Green*, L.J.; 2 De G. F. & J. 121.

9. *Mortgage of Assets—Annuity.*—D. by his marriage settlement conveyed certain leasehold hereditaments to trustees (subject to a mortgage) upon trust after his death, to raise an annuity for his widow. There being large arrears of the annuity, a deed was executed by the widow and the husband's executor, whereby the former agreed to abandon part of the arrears on the remainder being capitalized, and interest thereon, and punctual payment for the future, being secured by a mortgage of the leaseholds, and by the covenant of the executor to pay ground-rent and interest on the mortgage out of the general assets, exclusive of the rents of the leaseholds.

Held, on bill filed by the widow, that she was entitled to the benefit of the indenture. *Depree* v. *Bedborough*, V.C.S. 875.

10. *Scotch probate—Pending of proceedings in Scotland.*—A testator domiciled in Scotland made a will nominating the plaintiffs executors. They obtained confirmation of the nomination in Scotland and the seal of the Probate Court in England. They afterwards filed a bill against the surviving partners of the testator for an account.

Held, that it was no defence to the suit that proceedings were pending in Scotland to dispute the will. *Cumming* v. *Fraser*, M.R.; 28 Beav. 614.

FOREIGN ATTACHMENT.

Lord Mayor's Court—Assignment of moneys in hands of garnishees—Notice of attachment.—A foreign attachment in the Lord Mayor's Court only operates upon those moneys in the hands of the garnishees, in respect of which the debtor could have brought an action at the time of the attachment, or at any time between the issuing thereof and the entry of the pleas of the garnishees.

Where, therefore, before the attachment, the debtor had assigned all his interest in the property sought to be attached, and notice thereof was given to the garnishees, it was held that the attachment had no operation as against the assignee. *Webster* v. *Webster*, M.R. 503; 6 L. T. N. S. 11.

FRAUD.

Fraudulent representation—Jurisdiction—Discovery.—Every man is responsible for the consequences of a false representation made by him, with the immediate and direct intent that it should be acted upon, whether such representation has been acted upon by the person to whom it is made, or by a third person.

But where false representations have been made by the directors of a company, with a view to procuring a settling day upon the Stock Exchange, for the purpose of compelling persons who were under contract to deliver shares, to deliver them at a minor premium, and there is nothing to fix the company with knowledge of this scheme, by its directors, the company will not be held responsible for those representations by which a person has been collaterally and incidentally injured. In such a case a demurrer to a bill against the company was allowed.

The jurisdiction of the Court to compel discovery is not ousted by the Common Law Procedure Act enabling a plaintiff to obtain discovery at law as to

the truth or falsehood of certain averments. *Barry* v. *Crosskey*, V.C.W.; 2 J. & H. 1.

FRAUDS, STATUTE OF.

Implied Contract—Agreement not to be performed within a year.—C. contracted with P. to take a certain amount of coals daily, on certain terms, for three years. Before the expiration of two years, C. transferred his business to P. F. C.; and P. continued to supply coals to P. F. C. on the same terms as had been supplied to C., but no agreement in writing was entered into between P. and P. F. C.

Held, that a new contract must be implied between P. and P. F. C., and as it could not be performed within a year, it was within the Statute of Frauds. *Re Pentreguinea Fuel Company (Limited)*, L.J. 656.

FRAUDULENT CONVEYANCE.

13 *Eliz. c. 5—Lien for costs*—1 & 2 *Vict.* c. 110. *s.* 19.—By a decree W was ordered to pay defendant's costs of a suit. After the decree, but before taxation or registry, W. sold his real estate, which was the whole of his property, to H., who had notice of the suit. The purchase money was received by A., who was W.'s solicitor, and who retained a considerable part of it to pay his costs in the suit.

On a bill filed by the defendant in the former suit against W., A., and H., seeking to set aside the sale and to charge the costs on the estate,

Held (reversing a decision of V. C. Stuart), that the sale was not fraudulent within the statute of the 13th Eliz., and that the decree not having been entered pursuant to the provisions of the 1 & 2 Vict. c 110, s. 19, till after the sale, the Court had no jurisdiction to make the costs of the former suit a lien on the estate. *Nortcliffe* v. *Warburton*, L.C. 635; V.C.S. 463; 8 Jur. L. S. 353; 6 L. T. N. S. 182.

FRIENDLY SOCIETY.

1. *Association—Construction of rules.*—The rules of an association, called the Carters Old Company, provided, "That any proprietor who may directly or indirectly engage any merchant's work who is charged in the company, or if it be offered him to do by the principals or any servant of the house, to be fined £50 for each house so taken; or should any house be uncharged, the fine to be the same if taken within six months; or should any proprietor leave the company to evade the fine, and engage or accept the work of any house, who is charged or may have been charged within six months, to be fined £50."

Held, upon the construction of this rule, that a member leaving the company was liable to pay the fines for engagements for merchants' work entered into by him before the date of his leaving, but not for such engagements made within six months after his leaving. *Brancker* v. *Roberts*, V.C.S.; 5 L. T. N. S. 305; 7 Jur. N. S. 1185; 3 Giff. 276.

2. *Benefit building society — Mortgage—Advanced member.*—Construction of the rules of a benefit building society as to the terms (in respect of fines and subscriptions) upon which an advanced member was held entitled to redeem his mortgage. *Handley* v. *Farmer*, M.R.; 29 Beav. 362.

3. *Policy of assurance in favor of widow of member* — 9 *Geo.* 4, *c.* 56 — 4 & 5 *Will.* 4, *c* 40 — 13 & 14 *Vict. c.* 115 — *Incomplete voluntary gift.* — The Friendly Societies Consolidation Act (13 and 14 Vict. c. 115), which repeals the previous Acts, preserves the provisions of such Acts as to all societies established under them, and it is not essential to the validity of policies of assurances granted by a society established under the old Acts, after the date of the Consolidation Act, that the sum thereby assured to be paid to a relation of the assurer exceeds the sum of £100 fixed by the Consolidation Act as the limit of such policies to be granted by societies established under it.

Whether, where by a policy of assurance the policy money is agreed to be paid on the death of A., the assured, to B., his nominee, and A. pays the premiums during his life, this amounts to a complete gift in favor of B., enforceable after the death of A. against his creditors—*quære.*—*In Re Owen, Clayton* v. *Owen*, M.R. 770.

4. *Scotch friendly society — Jurisdiction—22 & 23 Vict. c.* 63.—The Friendly Societies Act (18 & 19 Vict c. 63) directs that with respect to Scotch societies the sheriffs should have jurisdiction in the like cases as the county courts in Eng-

land have over English societies. A dispute having arisen in a Scotch society, the sheriff directed a case to be sent to the Court of Chancery under the 22 & 23 Vict. c. 63, to decide whether in a similar case in England the county court would have had jurisdiction. The Court refused to decide the point. *Brodie* v. *Johnson*, M.R.; 30 Beav. 129.

HUSBAND AND WIFE.

1. *Dissolution of marriage—Divorce and Matrimonial Causes Act*, 1857—*Public Policy.*—An agreement, by which the co-respondent to a petition by a husband for dissolution of marriage agrees to secure to the petitioner a sum of money in consideration of his withdrawing from the suit, will not be enforced in equity at the suit of the husband; such an agreement being void as against public policy, and 20 & 21 Vict. c. 85, s. 33. *Gibbs* v. *Hume*, V.C.W. 38; 31 L. J. Ch. 36; 7 Jur. N. S. 1301; 5 L. T. N. S. 308 (*nom. Gipps* v. *Hume*).

2. *Dissolution of marriage — Wife's* chose in action *— Practice — Payment into court—Trustee Relief Act—Costs.* —The effect upon the right of a husband to reduce his wife's *chose in action* into possession, of a decree pronounced by the Divorce Court dissolving the marriage, is the same as if the husband had died without having reduced it into possession, leaving the wife surviving, and the right to receive the same belongs absolutely to the wife.

Where a trustee has an ascertained sum in his hands, about the amount of which there is no dispute, but which is claimed by opposite parties, he is not justified in filing a bill to obtain the decision of the Court as to the rights of the parties, but ought to pay the money into court under the Trustee Relief Act.

Where he filed a bill for that purpose, the Master of the Rolls, after a consultation with the judges of the other branches of the court, held that the plaintiff was only entitled to such costs of suit as he would have received if he had paid the money into court under that Act. *Wells* v. *Malbon*, M.R. 364; 8 Jur. N. S. 249; 6 L. T. N. S. 39; 31 L. J. Ch. 344.

3. *Wife's equity to a settlement.* — Where a husband has received and spent property belonging to his wife, and a very small fund remains, having regard to the requirements of herself and children, and she becomes entitled to further property, the Court will settle the whole of such property on her.

In considering what portion of a wife's property ought to be settled upon her the Court will take into consideration the facts of each particular case, although, under ordinary circumstances, it will settle a moiety.

In the case of a bankrupt or an insolvent husband the court will direct a portion of property to which the wife is entitled to be paid to the assignee. *Re Merriman's Trust*, V.C.K. 334; 31 L. J. Ch. 367.

4. *Legitimacy—Access—Presumption —Lunacy.*—Where a husband was confined in a lunatic asylum, the wife being resident twenty-five miles off, and there was a special interdiction on their being left alone together when she visited him; yet it appearing on the evidence that there was a possibility of sexual intercourse, a child which was born under these circumstances held legitimate.

The child of a married woman is presumed to be legitimate, and the evidence to repel such presumption must be clear and conclusive, the *onus probandi* being on the party alleging the illegitimacy.

In considering an allegation of illegitimacy, the Court will look at the balance of probability, even strong doubts not being sufficient to prove such illegitimacy.

Family likeness may be a special circumstance, but, ordinarly speaking, the least possible weight is given to it. — *Plowes* v. *Bossey*, V.C.K. 332; 8 Jur. N. S. 352.

5. *Separation deed—Covenant by husband not to sue — Injunction to restrain suit for restitution of conjugal rights — Jurisdiction.* — A husband, having in a deed of separation covenanted with trustees on behalf of his wife that he would not endeavor to compel her to cohabit or live with him by any legal proceedings, afterwards commenced a suit against her in the Divorce Court for restitution of conjugal rights.

Held (reversing an order of the Master of the Rolls), that the trustees of the deed and the wife were entitled to an injunction to restrain him from proceeding with the suit.

The policy of the law and the jurisdiction of courts of equity in reference to deeds of separation considered. — *Hunt* v. *Hunt*, L.C. 215; 8 Jur. N. S. 85; 5 L. T. N. S. 778; 31 L. J. Ch. 161. — Reversing M.R. 161; 5 L. T. N. S. 412; 8 Jur. N. S. 45; 31 L. J. 161.

INJUNCTION.

1. Upon terms of the plaintiff giving judgment at law, to be dealt with as the Court should direct, and also giving notice of motion for decree forthwith, an injunction was granted to restrain the defendant from prosecuting an action at law commenced on a promissory note, and from in the mean time negotiating it. *Simons* v. *Cridland*, V.C.W.; 5 L. T. N. S. 523.

2. The Court declined to grant an injunction to restrain the directors of a projected bank from dissolving the concern where circumstances have rendered it impossible that the affairs can be carried on successfully, and the deposits have been actually returned to the shareholders. *The Bank of Switzerland* v. *The Bank of Turkey*, V.C.W.; 5 L. T. N. S. 549.

3. *Ancient lights — Obstruction.* — Defendant commenced the erection of a fluted glass screen, which was to have louvres at intervals, to be thirty-five feet from the ground, and to pass behind half of plaintiff's house, at a distance of thirty feet therefrom. Plaintiff moved for an injunction upon evidence of opinions that the screen would, when completed, materially obstruct the light and air.

Injunction refused. — *Ratcliffe* v. *The Duke of Portland*, V.C.S. 687.

4. *Ancient Lights — Slight obstruction — Injury to Business.* — The plaintiff was lessee of a dwelling-house, and carried on the business of a diamond merchant, and was described as such in the lease. The reversioners of the house proposed to erect a wall which would, in a slight degree, obstruct the plaintiff's light.

Held, that as the obstruction, however slight, would injure his business, the plaintiff was entitled to an injunction. *Hertz* v. *Union Bank of London*, V.C.S.; 2 Giff. 686.

5. *Ancient lights — Prescription Act* (2 & 3 *Will.* 4, *c.* 71) — *Acquiescence.* — Where light and air are admitted to an underground apartment through a grated area in a small yard, the covering over such yard with a skylight containing a sliding panel, by a person not the owner of the underground apartment, is such a nuisance as will be relieved against in equity. The period of seven months elapsing after a recognition of right to light and air is not sufficient to constitute a submission under the 4th section of 2 & 3 Will. 4. c. 71, but a person must file his bill within twelve months from such recognition. Where an Act constituting an interference with light and air is done before it is discovered, the Court will not, ordinarily, compel the undoing of it except at the hearing; but where there is knowledge of its being done, the Court will not grant an interlocutory application to restrain it, if not made at once. An equitable lessee can protect his title by asking relief against an infringement of his right, although he does not get a legal title as lessee till after bill filed. *Gale* v. *Abbot*, V.C.R. 748.

6. *Ancient lights* — 2 & 3 *Will.* 4 *c.* 71 (*Prescription Act*) — *Tenant from year to year — Reversioner.* — A. occupied an inn as tenant from year to year to B., from 1815. In 1837 B. purchased a cottage and garden immediately adjoining the inn demised to A.

In 1861 C. purchased the term and the reversion of the cottage and garden, and proceeded to erect buildings on the site of the garden, so as to exclude the light from the windows of a room in the inn overlooking the garden.

Held, that the case was within 2 & 3 Will. 4, c. 71, s. 3, and that A. was entitled to an injunction to restrain C. from interfering with the ancient lights enjoyed by A. for more than twenty years. *Simper* v. *Foley*, V.C.W.; 5 L. T. N. S. 669.

7. *Easement — Gas company — Private road — Covenant by freeholder to allow occupiers to use it as a private road.* — The freeholder of land, which was let for building villas, retained in his possession certain land which was laid out for private roads, and entered into a covenant that the occupiers of the villas should have as full use and enjoyment of the roads in as absolute a manner as if they were public roads. At the invitation of the occupiers, but without the consent of

the freeholder, a gas company broke up the surface of the roads for the purpose of laying down pipes to supply the villas with gas.

Held, that the freeholder had no right to prevent them from so doing. *Selby* v. *Crystal Palace District Gas Company*, L. J. 636; M. R. 432; 8 Jur. N. S. 422.

8. *Equitable relief—Action at law.*—When a bill states a clear case of equitable relief, and the circumstances of the case cannot be so conveniently disposed of at law as in equity, the Court will restrain by injunction all proceedings by the defendants (in equity) until further order. *Curlewis* v. *Morgan*, V.C.S.; 5 L. T. N. S. 372; 7 Jur N. S. 1187.

9. *Infringement of legal right — Delay—Railway company.*—Where there has been delay in the assertion of a legal right and the damage sustained is light, the Courts will not grant an injunction to restrain infringement.

This principle applied to the case of a railway company constructing its line so as to leave for the passage of a private road two intervals of nine feet three inches each, instead of one interval of twelve feet, as required by the Railway Clauses Consolidation Act. *Wintle* v. *The Bristol and South Wales Union Railway Company*, V.C.W. 210; 6 L. T. N. S. 20.

10. *Lessee's covenant to insure—Exorbitant premium—Liability of sub-lessee—Unsupported allegation as to character—Costs.*—A lessee covenanted to insure the demised premises in such office as his lessors should appoint. He sublet the premises, and his sub-lessees covenanted to pay what he should pay for insurance. He insured the premises, at an exorbitant premium, in an office not appointed by the lessors. The Court granted an injunction to restrain him from proceeding with an action to recover the premium from the assignees of his sub-lessees.

The bill contained an allegation that the lessee was agent of the company in which he had insured the premises. This was proved to be incorrect, and the bill was amended by striking out the allegation. Plaintiffs were ordered to pay the costs consequent on the allegation. *The Leather Cloth Company* v. *Bressey*, V.C.S. 370; 3 Giff. 474; 8 Jur. N. S. 425; 6 L. T. N. S. 63.

11. *Motion to commit.*—An interim injunction was granted to restrain the defendant from publishing in a monthly railway guide information copied from the plaintiff's work.

Upon motion to commit the defendant for breach of this interim injunction,—

Held, that as the defendant had taken some steps to put himself in the right the motion should stand over till the following term, but that he must pay the costs of the application. *Cornish* v. *Upton*, V.C.W.; 4 L. T. N. S. 862.

12. *Nuisance — Private injury — Information and bill—Proceedings at law.*—Information and bill to restrain the defendants from committing acts which, it was alleged, amounted to a public nuisance, and were injurious to the private rights of the plaintiff.

The Court refused to grant an injunction until the question of nuisance and injury had been determined at law, and ordered the information and bill to stand over so as to enable the Attorney-General or the informant to take such proceedings at law in respect of the alleged public nuisance and the plaintiff to bring such an action to recover the right, as were advisable. *Attorney-General* v. *United Kingdom Electric Telegraph Company*, M.R. 167; 5 L. T. N. S. 338; 8 Jur. N. S. 583; 31 L. J. Ch. 329.

13. *Pension for military services*—47 *Geo.* 3, *sess.* 2, *c.* £5.—The 47 Geo. 3, sess. 2, c. 25, does not apply to a pension granted by the East India Company to its military officers for past services. *Heald* v. *Hay*, V.C.S. 264; 3 Giff. 467; 5 L. T. N. S. 740; 8 Jur. N. S. 379; 31 L. J. Ch. 311.

14. *Prescriptive right.* — In the absence of any allegation of prescriptive right in the plaintiff the Court will not restrain the draining of gravel pits into a stream to the injury of watercress beds of the plaintiff supplied by such stream. *Weeks* v. *Heward*, V.C.W. 557.

15. *Right of way — Common landlord.*—D., A., and B., are the tenants of adjoining premises held of a common landlord; B. occupying vaults under all, one entrance to such vaults being in the front of the premises of A.D., has for many years used a vault under the front of his own premises, the only access to which is by the entrance under

the premises of A., of which B. has the key.

The whole of the property being sold under a decree of this Court, D. and A. purchase the premises of which they were tenants, and A. proceeding to build and block up the entrance to the vaults in the front of his own premises, whereby the communication with D.'s vault is cut off, D. moves for an injunction to restrain such blocking up. Motion refused with costs.

Whatever right may be acquired, or liability incurred, by tenants *inter se*, that cannot confer such right or liability on the common owner of both properties, inasmuch as a man cannot have a right or easement against himself; and therefore, where two parties purchase of a common vendor, whatever rights or liabilities exist as between themselves, there are none with regard to him, and a purchaser can only purchase subject to the same rights and liabilities as his vendor has or is subject to. *Daniel* v. *Anderson*, V.C.K. 366; 8 Jur. N. S. 328.

16. *Trade mark — Account.* — Perpetual injunction to restrain the use of plaintiff's trade mark, with inquiries as to profits for six years before bill filed, derived from the table of articles, having labels with the plaintiff's trade mark affixed, and attributable to the use of that mark. *Cartier* v. *Carlile*, M.R.; 8 Jur. N. S 183.

INQUIRY.

See LUNACY, 3.

INSOLVENCY.

1. *Assignment—Notice—Order and disposition.*—Circumstances under which notice to the solicitors for the trustees of a reversionary interest by the assignee of such reversionary interest, was held sufficient to establish the claim of the assignee to take the property out of the order and disposition of the assignor at the time of his insolvency. *Rickards* v. *Gledstanes*, V.C.S.; 5 L. T. N. S. 416; 3 Giff. 298; 8 Jur. N. S. 455; L.C. 5 L. T. N. S. 568; 31 L. J. Ch. N. S. 142.

2. *Solicitor — Assignment of costs — Order and disposition — Priority.* — Where a solicitor assigns costs, to which he is entitled in a suit, to secure a debt due from him, and becomes insolvent, notice of the assignment having been previously given to the other parties in the suit by the assignee, such costs are not in the order and disposition of the insolvent until the order is actually made for taxation and payment, and no stop order can be obtained on the fund in court in respect of costs mortgaged but not yet ordered to be paid. *Lord* v. *Colvin*, V.C.K. 420; 6 L. T. N. S. 211.

JOINT STOCK COMPANY.

1. *Amalgamation—Indemnity of shareholders.*—Under an amalgamation deed between the A. company and the B. company, the business and effects of the A. company were assigned to the B. company, and it was agreed that the shareholders in the A. company should be indemnified out of the funds of the B. company against all liabilities in respect of the B. company.

Held, that the indemnity extended to the company, but did not expressly extend to those shareholders in the A. company who had not executed the deed. *The Anglo-Australian Company* v. *The British Provident Society*, L.C. 588; 6 L. T. N. S. 517; 8 Jur. N. S. 628; varying V.C.S. 6 L. T. N. S. 68; 8 Jur. N. S. 229; 3 Giff. 521.

2. *Abortive amalgamation—Common mistake—Winding-up—Creditor's representative—Costs.*—Under an attempted amalgamation between two insurance companies, A. and B., A. transferred all its assets and policies, &c., while B, in consideration for this transfer, covenanted to pay all the debts and liabilities of A. C., a creditor of A., was no party to the attempted amalgamation, but accepted B.'s bond as a security for the debt originally due from A. The amalgamation was subsequently declared *ultra vires* and invalid, and a claim against B. by C. had been disallowed. On a subsequent claim, however, by C. against A,

Held, that C. was entitled to be replaced in his original position of creditor upon A., there having been a common mistake as to the abortive amalgamation against which C. would be relieved.

Held, however, that as there had been an actual transfer of property from A. to B., of which B. had had the full benefit, these two companies could not be restored to their original position, and that a claim by B. to prove as creditor of A. for the amount paid by them (after giv-

ing credit for the assets received) must be disallowed.

The creditors' representative in such cases is entitled to his costs. Observations upon the practice. *Re Saxon Life Assurance Society, The Anchor Assurance Company's Case, The Era Assurance Society's Case*, V.C.W. 724.

3. *Debentures—Assignor and assignee.* — Debentures were given by a joint stock company to A., an honorary, but not returned upon the register as an ordinary, director, in payment of his claim against the company for work and labor. These debentures were assigned by A. to B. as a security for a debt. B. applied for the interest, was asked by the secretary to allow further time, but ultimately obtained judgment against the company for the arrears in an action brought by him on the debentures in A.'s name.

Held, that although A.'s contract was void under sect. 29 of 7 & 8 Vict. c. 110, so as to render invalid the debentures in his hands, yet that after the recognition of them by the company, with full notice, and without objection raised, B. was not affected by their invalidity, and was entitled to prove for the amount under the winding-up of the company.—*Re South Essex Gas Light and Coke Company, Hulett's Case*, V.C.W. 226; 2 J. & H. 306; 5 L. T. N. S. 663; 8 Jur. N. S. 357; 31 L. J. Ch. 293.

4. *Debentures—Unsettled accounts—Equitable set-off — Assignee.* — Debentures were issued by a limited company, and certain ships were assigned to trustees upon trust to secure "to the holders for the time being" of the debentures the amount therein expressed to have been lent to the company. Some of these debentures were issued to agents of the company who had incurred expense on its account. An assignee for value from the agents now sought to have the debentures paid out of the proceeds of the sale of the ships. The company alleged that there were outstanding accounts between themselves and their agents, on which a large balance would be found due to them, and they claimed to set off this balance against the amount payable on the debentures.

Held, that, even without reference to the peculiar form of the trust-deed, the company had no such equity against the parties to whom they issued the debentures, and therefore they had none against the assignee. *Aslatt* v. *Farquharson*, V.C.W. 458.

5. *Deposit note—Contract by director with company*—7 & 8 *Vict. c.* 110, *s.* 29. —L., a director, received from the company a cheque, paid in one of his own for a like amount, and received in exchange a deposit note for the same amount. This transaction was never confirmed by a general meeting.

Held, that L.'s mortgagee was entitled to an equitable lien on the sum secured by the deposit note. *Woodhams* v. *Anglo-Australian and Universal Family Life Assurance Society and Sturgis*, V.C.S. 290; 8 Jur. N. S. 148; 5 L. T. N. S. 628; 3 Giff. 238.

6. *Extension of business — Power to bind shareholders — Policy — Return of premiums.* — A joint stock company, established as a life assurance company, has no power to extend its business to marine insurance by resolutions to that effect, and the shareholders cannot be bound to an illegal course of proceeding by the receipt of circulars announcing the extension, even though the circulars are accompanied by a dividend, the result of such extension—the directors having no power to change their course of business in any mode less formal than a fresh deed of settlement signed by all the shareholders.

But although holders of policies thus illegally granted cannot recover upon them against the company under the Winding-up Act, they are entitled to a return of the premiums paid by them. *Re The Phœnix Life Assurance Company, Burgess and Stock's Case*, V.C.W. 816.

JOINT TENANT.

1. *Severance.*—Where there has been a course of dealing by all parties interested sufficient to intimate that the interests of all have been mutually treated as constituting a tenancy in common, and irreconcilable with the continuance of a joint tenancy, the court will hold that the joint tenancy has been severed. *Williams* v. *Hensman*, V.C.W.; 1 J. & H. 546; 5 L. T. N. S. 203; 7 Jur. N. S. 771; 30 L. Ch. 878.

2. *Severance—Contract of sale.*—Two joint tenants contract to sell the estate, the purchase money to be equally divided between them.

Held, that this operates as a severance

of the joint tenancy. *Kingsford* v. *Ball*, L.C. (1852); 2 Giff. App. 1.

JUDGMENT—JUDGMENT CREDITOR.

1. *Bankrupt.*—Where a judgment for a debt has been obtained in a court of competent jurisdiction it is neither proper nor competent for any other tribunal to enter into the consideration of the foundation of the debt.

Therefore, where a prisoner under a judgment recovered in the Court of Exchequer for a sum exceeding £20, was adjudicated bankrupt under the 101st section of the 24 & 25 Vict. c. 134, it was held that it was not competent to him upon an appeal against the adjudication to show that the debt was under £20, and therefore that he was not legally a prisoner. *Ex parte Hayward*, L.J.; 6 L. T. N. S. 271.

2. *Consideration — Services rendered — Distinction between professional and non-professional persons.*—Where a non-professional person claimed a benefit under a judgment confessed and given to him by another upon the ground of services rendered by him to the latter, the court held that the burden of proof as to the consideration lay on the former, and that as he had failed to prove the consideration for the judgment, his claim must be disallowed.

Distinction noticed between professional and non-professional persons in cases of gratuitous gifts, or gifts in consideration of services rendered. *In re Carew's Estate Act, Isaac's Claim*, M.R. 98; 8 Jur. N. S. 297; 31 L. J. Ch. 214.

3. 23 & 24 *Vict.* c. 38, *s.* 1.—*Foreclosure suit — Costs.*—S. A., a registered judgment creditor, who had issued execution and registered, but never executed the same, was held to be a proper party to a foreclosure suit instituted more than three months after registration of execution; and having appeared after having disclaimed, and received notice not to appear, was disallowed his costs of appearance.—*Appleton* v. *Sturgis*, V.C.S. 312.

4. *Priority—Notice—Registration—Middlesex Registry Act.*—A judgment creditor, who by first registering in Middlesex has obtained priority at law over a judgment of earlier date, registered in the Common Pleas, but not in Middlesex, will not be postponed in equity, because he had, at the time of so registering, notice of the earlier judgment. *Benham* v. *Keane*, L.J. 67; 5 L. T. N. S. 439; 31 L. J. Ch. 129; 8 Jur. N. S. 604.

JURISDICTION.

1. Lex loci rei sitæ—*Petition of right.*—Land in a colony was taken for the purpose of constructing a canal under the authority of an Act of the colonial legislature. An Act was afterwards (1843) passed in the colony for vesting in the Ordnance Department the canal and works, and providing that all lands taken, but not actually used for the canal, should be restored to the owners. By a subsequent Act of the colony (1856) the Ordnance estates were vested in the Crown for the benefit, use, and purposes of the province.

Held, that this court would not entertain a petition of right for restoration to the petitioners of the lands taken from their predecessors in title, but not actually used for the purposes of the canal, no jurisdiction having been acquired under the Petition of Right Act, 1860, by the courts of this country to adjudicate upon land in the colony vested in the Crown, for the purposes of the province, by Act of the Colonial Legislature. In such a case the court will not, for the purpose of acquiring jurisdiction to make a decree *in personam*, assume the Queen to be in the position of a trustee of lands abroad present in this country. *Holmes* v. *The Queen*, V.C.W. 39; 8 Jur. N. S. 76; 5 L. T. N. S. 548; 31 L. J. Ch. 58.

2. *Specific chattel—Action at law.*—Although the court will order the delivery of a specific chattel, such as a picture, to the person seeking to enforce his right to it, on the ground that he ought not to be left to recover that value merely which a jury might put upon it, yet where the person has himself placed a definite price upon the chattel, the court will not interfere in aid of what is a mere money demand, and as such, capable of being enforced by action at law. *Dowling* v. *Betjemann*, V.C.W. 574; 6 L. T. N. S. 512.

LACHES.

Purchase by administrator.—Right of next of kin to the benefit of the pur-

chase by an administrator of mining property.

Held, to have lost by non-claim. *Whalley* v. *Whalley*, L.J.; 2 De G. F. & J. 310.

LANDLORD AND TENANT.

1. *Forfeiture—Breach of covenant.*—In peculiar circumstances the court will relieve against forfeiture for breach of covenant to repair. A landlord brought his action of ejectment, assigning breaches of covenant to pay rent, and to keep insured and in good repair. He recovered judgment by default, and entered into possession of the demised premises. The circumstances of the case were peculiar. On bill filed by the tenant the court granted relief on terms. *Bamford* v. *Creasy*, V.C.S. 861.

2. *Right of landlord to fixtures.*—Where the lessee of a coal mine had covenanted at the end of the term to yield up the works and mines, &c., and all ways and roads, in such good repair, order, and condition, so that the works might be continued and carried on by the lessor,

Held (reversing the judgment of Vice-Chancellor Stuart), that such covenant did not include wooden sleepers or iron tram plates fastened to such wooden sleepers used for the purpose of a railway.

Quære, whether such covenant would have included stone sleepers and iron tram-plates fastened to stone sleepers. *Duke of Beaufort* v. *Bates*, L.J. 200; 8 Jur. N. S. 270; 6 L. T. N. S. 82; V.C.S. 149; 5 L. T. N. S. 546.

LAPSE OF TIME.

Equitable relief—Legal title.—A court of equity will not relieve a corporation claiming upon a mere legal title, under a charter granted by Henry VIII., against a continued and recognized possession and a direct assertion of title by the Crown for more than two hundred years. *Corporation of Hull* v. *Attorney-General*, V.C.W.; 5 L. T. N. S. 420.

LEASE—LESSOR AND LESSEE.

1. *Renewable leasehold—Fine—Tenant for life and Remainderman—Breach of trust.*—Renewable leaseholds were settled with a provision that the trustees should do all acts, &c., necessary for obtaining a renewed lease, and pay the fines, &c., attending such renewal from time to time "by and out of the annual rents, issues, and profits of the said hereditaments." Power was also given to the trustee, in case the money for payment of the fines should not be produced by the money aforesaid, to raise the money by mortgage of the property. The rents having been misapplied by the trustee,

Held, that the fines must be paid out of the income, and not out of the corpus, and that the loss arising from the breach of trust must be borne by tenant for life, and not the remaindermen. *Solley* v. *Wood*, M R.; 29 Beav. 482; 30 L. J. Ch. 813; 7 Jur. N. S. 1225.

2. *Renewable lease—Purchase of Reversion — Ecclesiastical Commissioners.*—Lessees for lives from an ecclesiastical corporation were in the habit of granting under leases, with a covenant that whenever they took a new lease of the property or had a new life added, they would renew and add such life to the under-lease on payment by the sub-lessees of a certain fine.

The Ecclesiastical Commissioners in 1858 refused to renew the lease to the lessees, but offered to sell them the reversion on reasonable terms. The lessees accepted these terms, and purchased the reversion.

Held, that after this purchase of the reversion into which the lessees had been compelled, the right of the sub-lessees was not to have their lease renewed or a fresh life added, but to be allowed to purchase the reversion from the lessees upon terms. *Postlethwaite* v. *Lewthwaite*, V.C.W. 459; 2 J. & H. 237.

LEASES AND SALES OF SETTLED ESTATES ACT.—(19 & 20 VICT. C. 120.)

1. *Application for re-investment in the purchase of lands—Notices dispensed with—No existing trustee—Order to convey to new trustees to be appointed.*—The 20th section of the Leases and Sales of Settled Estates Act, which requires notice of every application to the Court under the Act to be inserted in such newspapers as the Court shall direct, does not apply to applications under the Act as to the reinvestment of the money arising from the sale of settled estates in the purchase of other lands.

Where there was no trustee of the settled estate which had been sold in existence, the Court required new trustees to be appointed, and the conveyance of the lands purchased to be made to such new trustees. *In re The "Sexton Barnes" Settled Estates*, M.R. 416; 6 Jur. N. S. 40.

2. *Settlement—"Succession."*—In considering whether an instrument is a "settlement" within the meaning of the Leases and Sales of Settled Estates Act, the terms of the instrument must be looked at, not the events which have happened. *Re Goodwin's Settled Estates*, V.C.S. 612; 6 L. T. N. S. 530.

LEGACY—LEGATEE.

1. *Master and servant—Dismissal.*—Testator bequeathed to his housekeeper A. £50 and furniture, &c., "in case she shall be in my service at my decease." During his last illness the testator was removed to an asylum, and A., though asked by the family to remain, refused to stay any longer in the house, and received her wages, leaving a few days before the death of the testator at the asylum.

Held, that by dismissing herself she had forfeited her claim to the legacy. *Re Serres' Estate, Venes* v. *Marriott*, V.C.W. 751.

2. *Payment—Presumption.*—A legacy of £100 was bequeathed in 1818 to B. in trust to invest the same for C., and to apply the dividends and likewise any part of the principal, if he should think fit, for the benefit of C. during his minority, and pay the remainder to him on his attaining twenty-one. The legacy was never invested by B., but C. lived with and was maintained by him until his death in 1829. B., by his will, bequeathed a sum of £2200 upon trusts for the benefit of C. Shortly after B.'s death in 1829 his trustees invested £100 to meet the original legacy of that amount in the event of any claim. C. died in 1859 without having ever claimed his £100.

Held, that the presumption of payment of the £100 legacy arising from the lapse of time was rebutted by the appropriation by the trustees in 1829 of the £100 to meet the possible claim, and that C.'s representative was entitled to the invested £100 and the accumulations. *Re Clare's Trust*, V.C.S.; 4 L. T. N. S. 789; 7 Jur. N. S. 769.

LEGACY DUTY.

1. *Annuity—Statute* 36 *Geo.* 3, *c.* 52, *ss.* 8, 12—*Legacy in succession.*—Where a testator gives annuities out of his residue, and directs the residue to be accumulated upon certain trusts, and ultimately gives the whole residue to persons chargeable at the same rate of duty as the annuitants—

Held, that duty was payable on the annuities under sect. 8 of the Legacy Duty Act, and not on the capital under sect 12. *Crow* v. *Robinson*, L.J. 306; 6 L. T. N. S. 372.

2. *Legacy duty—Executor—Tenant for life and remainderman—Receiver.*—Where for a number of years a tenant for life, under an order in a suit, has received the income of a fund without deducting legacy duty, neither the executor nor the tenant for life can claim to be recouped (supposing the Crown succeeds in making either liable) for the interest of those entitled in remainder. Assuming that it is the duty of the Court to set apart the legacy duty, it is no less the duty of the executor, being a party to the suit, to see that it is provided for: and after standing by for a lengthened period, he cannot claim it against the estate on the death of the tenant for life; but the Court will decide none of these questions in the absence of the Crown. *Bowra* v. *Rhodes*, V.C.K. 747.

LIMITATIONS, STATUTE OF.

1. *Acknowledgment.*—The drawer of a bill of exchange in a letter to the holder stated, "If in funds I would immediately pay the money, and take the bill out of your hands."

Held, that this passage did not amount to an admission of the debt, or a promise to pay. *Richardson* v. *Barry*, M.R.; 29 Beav. 22.

2. *Assent of Executor—Constructive trust.*—B. having lent G. £600 on a promissory note, by his will gives the £600 so secured for the benefit of his daughter for her separate use for life, with remainder to her children, and appoints her husband executor. The husband being indebted to G., is induced to hand over to him the promissory note. Twenty years, less a day, elapse, and a

bill is filed by the daughter and one child who has attained twenty-one for the recovery of the £600, stating the above facts, and that G. knew of this bequest, and that the handing over to him was a breach of trust; and asking a declaration that G. was a trustee for the plaintiff. A general demurrer for want of equity and parties is put in, on the ground that the Statute of Limitations is a bar, that the executor was not stated to have assented, and that the other children ought to have been parties.

Held, that on the question of time and parties the demurrer must be allowed, but with general leave to amend, and that the other grounds of demurrer were untenable. *Rolfe* v. *Gregory*, V.C.K. 711; 8 Jur. N. S. 606.

LUNACY—LUNATIC.

1. *Lunacy Regulation Act*, 16 & 17 *Vict. c.* 70. — *Real estate of lunatic.* — When the real estate of a lunatic, dying intestate, is sold under the Lunacy Regulation Act, the money representing it is treated as real estate only for the purpose of determining who is entitled to it, and for other purposes it is to be treated as personalty. *Re Trevelyan*, L.C. 828.

2. *Jurisdiction—Costs.*—A decree for partition was made of an estate, one share of which belonged to a lunatic as tenant in tail. It was directed that the lunatic's costs should be raised by mortgage out of the land allotted to her. The lunatic's share was, however, conveyed to her in tail, without any provision for the costs.

On a petition in lunacy, held, that the Court had no jurisdiction in lunacy to authorize the committee to raise the lunatic's costs by mortgage. *Re Bloomar*, L.J.; 2 De G. F. & J. 154.

3. *Jurisdiction — Costs — Inquiry.*— The Lords Justices will not, except under special circumstances, have a personal interview with an alleged lunatic prior to issuing an order for inquiry.

It is doubtful whether the Court of Chancery has jurisdiction on the return of an inquiry in lunacy, where the result of the inquiry is in favor of the alleged lunatic, to make an order as to the costs; but if the Court has such jurisdiction, it will not order the costs of the alleged lunatic to be paid by the parties instituting the proceedings where they had a reasonable ground for so doing. *Re Windham*, L.J. 499; 8 Jur. N. S. 448; 6 L. T. N. S. 479.

4. *Lunatic not so found by inquisition—Maintenance.*— In the case of a lunatic not so found by inquisition the Court has no jurisdiction to make an order for his maintenance unless proceedings have been taken for placing his property under the administration of the Court of Chancery. *Re Tayler*, L.J.; 2 De G. F. & J. 125.

5. *Lunatic not so found by inquisition — Past Maintenance — Jurisdiction.*— Where a fund in court belongs to a person of unsound mind, not found lunatic by inquisition, applications respecting it should be made to the Court in its ordinary jurisdiction, and not in lunacy. *Re Irby*, 17 Beav. 334, not followed.

A sum of stock transferred into court under the Trustee Relief Act, and being the only property of a person of unsound mind, not found lunatic by inquisition, ordered to be paid to his father in part satisfaction of expenses incurred for past maintenance, he undertaking to continue the maintenance and support for the future. *Re Macfarlane*, V.C.W. 369; 8 Jur. N. S. 208; 6 L. T. N. S. 154; 31 L. J. Ch. 335.

MARSHALLING.

Bequest to charity.—Where a testator gave his leaseholds, and also the residue of his property, to a charity—

Held, that the leaseholds must contribute rateably with the residue towards payment of legacies, though the charity thereby received an indirect benefit from them. *Scott* v. *Forristall*, V.C.S. 37; 5 L. T. N. S. 709.

MERCANTILE LAW.

Consignment of cargo—Bills of lading—Bills of exchange drawn by consignor against cargo—Liability of consignee — General lien of consignee — Priority. — Where a merchant abroad consigns a cargo of goods to a merchant in England, sending him the bills of lading, and at the same time informs him that he has drawn upon him against such cargo a bill of exchange in favor of a third person, the receipt, and subsequent realization of the cargo by the consignee does not create an obligation on his part to pay the bill of exchange out of the

proceeds in priority to the general lien to which, by the custom of trade, he is entitled on the cargo for the general balance due to him from the consignor. Such general lien attaches, by the law merchant, upon the goods immediately on their arrival, and can only be postponed in favor of another claimant by some assent, express or implied, on the part of the consignee.

The mere fact of his receiving and realizing the cargo does not amount to an assent on the part of the consignee to the payment out of the proceeds thereof of the bills of exchange drawn by the consignor against it in favor of third persons, though he may have notice of them before the cargo arrives. *Frith* v. *Forbes*, M.R. 658.

MINE.

1. *Cost book — Preliminary contract.* — A company formed upon the cost book system is only bound by the regulations entered in the cost book, and is not affected by any preliminary contract made before the formation of the company. *Thomas* v. *Hobler*, L.C.; 8 Jur. N. S. 125; 5 L. T. N. S. 564.

2. *Landing rent — Joint owners of coal.* — Where one of two tenants in common of coal mines is sole owner of the surface on which their tenant has sunk a shaft, the profits arising from landing foreign coal through that shaft do not belong exclusively to the owner of the surface, but must be shared by both co-tenants. *Clegg* v. *Clegg*, V.C.S. 75; 5 L. T. N. S. 441; 8 Jur. N. S. 92; 31 L. J. Ch. 153; 3 Giff. 322.

3. *Mode of working — "Instroke."* — In the absence of express contract, the lessee of a mine is entitled to work the minerals by "instroke." *Whalley* v. *Ramage*, V.C.W. 315.

4. *New vein — Tenant for life.* — Sinking a shaft in a mine already open in order to work a new vein in the same mine is not opening a new mine, and when under a lease granted by a testator and afterwards agreed to be renewed by the trustees of his will, the lessees, after his death, sunk a new shaft for the purpose of working a new vein or seam lying below those already worked by them under such lease.

The Court held that the latter was not a new mine, but the tenant for life under the will was entitled to all the rents payable in respect of the minerals so leased and worked. *Spencer* v. *Scurr*, M.R. 878.

MISTAKE.

Rectification — Testimony of parties seeking to be relieved — Evidence — Communication of effect to volunteers — Consideration — Separate solicitor. — Two ladies agreed with several of their brothers to execute a deed whereby the sum of £200 a year a piece was to be secured, to be paid by them for the benefit of another brother, who had not been so well provided for under their father's will. By the deed which was executed carrying out such intention the annual payments were directed to be paid during the lives of the donors for the benefit of the wife and children of the brother, as well as of the brother himself. The annual payments were made to the brother for upwards of fourteen years, when he died. Upon his death the two ladies discovered, as they alleged in their bill, for the first time, that by the terms of the deed the annual sums were to be continued during each of their lives in favor of their brother's widow and children; and thereupon they instituted this suit praying to be relieved from the further operation of the deed, upon the ground that each of them, when they executed it, intended to allow the annuities in question merely during the joint lives of herself and her brother, and not for any longer period. This view of the intention of the parties when the deed was executed was not borne out by the evidence of other parties to the transaction.

Held, that there being no fraud and undue influence, the court could not relieve the plaintiffs from the effect of the terms of the deed.

The court will not, especially after it has been acted upon for a number of years, set aside a voluntary deed, or restrain its future operation, on the ground of mistake in the parties who executed it, upon no other testimony than that of the persons who are bound by it, and who will benefit by its being destroyed or altered.

Where a voluntary deed is executed in favor of persons to whom its contents and effect is communicated by the donors or their agents, and then it is acted upon,

the court cannot afterwards set it aside, upon the ground that the donors did not intend it to operate to the full extent of its terms.

Where a deed is executed to carry out a family arrangement, it is not material, upon the question of mistake as to its full effect on the part of the persons executing it, that no separate solicitor was engaged for them in connection with the transaction.

A deed carrying out a contract between A. and B., that they will each grant an annuity to C. (a volunteer) — *quære*, whether a purely voluntary deed. *Bentley* v. *Mackay*, M.R. 593; 6 L. T. N. S. 632: affirmed L.J. 873.

MORTGAGE — MORTGAGOR AND MORTGAGEE.

1. *Account—Premium on Policies.*—In the absence of special contract a mortgagee in possession is not entitled to charge in account the premiums which he may have paid upon a fire insurance of the property, effected by himself. He is entitled to claim interest on all premiums paid by him within six years upon a policy on a life of the mortgagor, and delivered to him as a collateral security. *Bellamy* v. *Brickenden*, V.C.W.; 2 J. & H. 137.

2. *Administration of assets—Assent of mortgagee to sale in suit — Notice to pay off mortgage—Additional interest.*—Where in an administration suit a mortgagee assents to a sale of the mortgaged property, his assent amounts to the usual notice to pay off the mortgage debt, and if the sale does not take place within six months after the assent given, the mortgagee is not to be allowed any additional interest, but is only entitled to his principal and interest up to the time of payment.

If the sale takes place, and the mortgage debt is paid within six months after the assent given, the mortgagee is entitled to so much interest, in addition to the interest up to the time of payment, as will make up the six months' interest to which he would have been entitled in case the mortgage debt had been paid off out of court. *Day* v. *Day*, M.R. 728.

3. *Administration — Insufficient security.*—Where, in an administration, the personal estate is insufficient to pay the debts in full, an equitable mortgagee, who is also a simple contract creditor in respect of the same debt, and whose security is also insufficient, is entitled to prove for and take a dividend upon the entire debt for the time being actually unpaid, notwithstanding that the security has been realized by order of the court, and the proceeds have been carried on to a separate account to meet the said mortgage claim. But such creditor must not ultimately receive more than twenty shillings in the pound from all sources. *Rhodes* v. *Moxhay*, V.C.S. 103.

4. *Charge—Statute of Limitations—3 & 4 Will. 4, c 27.*—The word "charge" in the 42d section of 3 & 4 Will. 4, c. 27, does not of itself include mortgages; yet, as the 40th section expressly mentions them, they must be included in sect. 42, from the necessity of construing those two sections by reference to each other.

Dearman *v.* Wyche, 9 Sim. 570; Du Vigier *v.* Lee, 2 Hare, 326, questioned.

A deed by which a mortgage was assigned, and to which the mortgagor was a party, contained a recital that a certain amount of interest was due.

Held, that such recital would prevent the statute from barring the assignee's right to recover interest which accrued due more than six years before the filing of the bill; and bound the mortgagor, and also second mortgagees, not parties to the assignment. *Bolding* v. *Lane*, V.C.S. 556; 8 Jur. N. S. 407; 6 L. T. N. S. 276.

5. *Conditional sale — Fraud or pressure—Undervalue.*—Where a person in pecuniary difficulties executed a conveyance of land, at an undervalue, under circumstances which tended to show a belief on his part that the transaction was intended to be a mortgage transaction, and not an absolute sale, the same solicitor acting for both parties, the court set aside the instrument as an absolute sale. *Douglas* v. *Culverwell*, L.J. 327; 6 L. T. N. S. 272; V.C.S. 189; 3 Giff. 251; 31 L. J. Ch. 65; 5 L. T. N. S. 484; 8 Jur. N. S. 29.

6. *Deposit of title deeds—Exoneration of mortgaged estate.*—An executor had in his possession the title deeds of an estate, of which the testator and a debtor to his estate were tenants in common.

In answer to a request by the executor, the debtor wrote to say that the

executor might retain the deeds till he (the debtor) had got the whole of his affairs settled by the executors.

Held, that this was a good equitable mortgage.

A father-in-law paid off his son-in-law's mortgage debt, and took a receipt from the mortgagee, in which the mortgagee agreed to reconvey the mortgaged property when required.

Held, that he showed no intention to exonerate the estate for the benefit of his son-in-law. *Fenwick* v. *Potts*, L.J.; 8 De G. M. & G. 506.

7. *Equitable mortgage by deposit—Agreement to execute a legal mortgage.*—An agreement in writing, accompanying a deposit of deeds, to charge land with a sum of money, is nothing more than an equitable charge enforceable in equity by having the money raised by sale or mortgage, and gives no right to foreclose, nor to ask for a legal mortgage.

An agreement to give a legal mortgage, superadded upon an agreement to charge land, gives a right to have that contract enforced in equity, and by the same decree to foreclose, unless the money is paid.

A simple deposit of deeds is a charge enforceable in equity, but gives no right to have a legal mortgage, although, in the view of a court of equity, it is a contract to charge the land, and the remedies are the same.

A contract to charge land, and also, if required, to give a legal mortgage, accompanied by a deposit of deeds, gives a right to a sale, but does not compel the mortgagee to take a legal mortgage. *Matthews* v. *Goodday*, V.C.K. 148; 31 L. J. Ch. 282; 8 Jur. N. S. 90; 5 L. T. N. S. 572.

8. *Deposit of title deeds—Stamp Act* (13 & 14 *Vict. c.* 97).—A memorandum that on a certain day title deeds were deposited to secure the repayment of money advanced with interest is not an agreement for a mortgage so as to require a stamp within 13 & 14 Vict. c. 97. *Meek* v. *Bayliss*, V.C.S.; 31 L. J. Ch. 448.

9. *Ejectment—Waiver of forfeiture by receipt of interest.*—Shortly after the execution of a mortgage it was agreed in writing that the mortgagee should not call in the money for two years, the mortgagor fulfilling his covenants. When the first half-year's interest became due, the mortgagor failed to pay it on the day. Three weeks afterwards the mortgagee's solicitor gave notice that in consequence of his default the mortgagee would not wait the two years, but would exercise his right at discretion. At the same time the half-year's interest was demanded and paid.

The mortgagee having afterwards commenced an ejectment, an injunction was granted to stay proceedings until the hearing. *Langridge* v. *Paine*, V.C.W. 726.

10. *Foreclosure—Husband and wife.*—Circumstances under which the common decree for foreclosure was made against husband and wife in respect of a mortgage of the wife's invested property after marriage. *Lewis* v. *Poole*, V.C.S.; 8 Jur. N. S. 536.

11. *Foreclosure or sale—Practice—Motion to stay proceedings on payment, &c.*—7 *Geo.* 2, *c.* 20—15 & 16 *Vict. c.* 86, *s.* 48. — F., claiming to be one of many incumbrancers, obtained a decree with a reference as to incumbrances and their priorities. Subsequently P., the first mortgagee, filed a bill against the mortgagor and numerous incumbrancers for an account, foreclosure, or sale, and F. moved in the suit for an account and to stay proceedings on payment to P. of principal, interest, and costs, including costs of suit. The court refused the motion, and directed a sale against the wish of F., but in compliance with that of the other mortgagees. *Paine* v. *Edwards*, V.C.S. 709; 6 L. T. N. S. 600.

12. *Husband and wife—Charge on wife's property—Post-nuptial settlement.*—On the 11th June, 1858, A. signed a memorandum charging in favor of B. the interests to which he was entitled in his wife's property by marital right, and pledging himself not to encumber the property to the prejudice of B. On the 18th June a post-nuptial settlement was executed by A. of his wife's property, with notice to, but without the consent of, B. In July, 1858, A. assigned by way of mortgage his wife's property (included in the post-nuptial settlement) to B., and also assigned by way of further security for moneys due, and future advances, a policy being reserved upon his wife's life, the equity of redemption being reserved to A.

Held, that the memorandum of the 14th June created a valid equitable charge in favor of B., and in respect of the debts thereby accrued, and to that extent prevailed against the post-nuptial settlement of July; but that the subsequent mortgage and assignment of the policy of such could not affect the property of his wife vested in the trustees and of the post-nuptial settlement. *Carew* v. *Arundell*, V.C.S.; 8 Jur. N. S. 71; 5 L. T. N. S. 498.

13. *Husband and wife—Mortgage of wife's reversionary interest—Foreclosure.*—A. B. being entitled for her separate use to a reversionary interest in certain sums of money under a will, joined, as surety for her husband, W. B., in an assignment of her interest to a banking company, to which her husband was indebted. By this deed she assigned to the trustees of the banking company the trust moneys to which she should become entitled under the said will, and W. B. also assigned a policy of assurance on his own life, which sums of money and policy were to be held upon trust, in the first place, to defray the costs of the trust thereby created; and, upon further trust, to retain and pay to the banking company the money due to them, and to pay the residue to A. B. and W. B., according to their respective interests therein. The deed contained no reference to foreclosure of the equity of redemption, and no power of sale. The money due on the security being unpaid, the banking company filed a bill for foreclosure or sale.

Held, that the mortgagees were not entitled to a decree foreclosure or sale, so far as related to the wife's reversionary interest, and were only entitled to receive the same when it fell into possession, and to retain and pay thereout the amount due on their security. *Stamford, &c., Banking Company* v. *Ball*, L.C. 196; 5 L. T. N. S. 594; 31 L. J. Ch. 143; 8 Jur. N. S. 420.

14. *Interest—Covenant to pay principal.*—The recital in a mortgage deed was to the effect that the mortgagee had agreed to advance the money on having the same "with interest" secured; but the covenant for payment and the proviso for redemption made no mention of interest.

Held, that interest was payable at £5 per cent. *Ashwell* v. *Stanton*, M.R.; 30 Beav. 22.

15. *Notice—Bankruptcy—Order and disposition—Trustee Relief Act.*—Where an assignee of a policy of assurance deposits it by way of sub-mortgage, and the sub-mortgagee gives notice to the executor of a prior mortgagee, but not to the insurance office, and the assignee becomes bankrupt, such policy is in the order and disposition of the bankrupt, with the consent of the true owner, and as between the sub-mortgagee and the assignees belongs to the assignees.

Where a residuary legatee mortgages his share in the testator's estate, and his mortgagee deposits his mortgage to secure money owing from him, and the depositee gives notice to the executor, on the bankruptcy of the mortgagee, the share of the residuary legatee so mortgaged is not in the order and disposition of the bankrupt; but the notice of the depositee to the executor prevails against any subsequent incumbrancer, as to the whole assets, as well in the executor's hands as outstanding; and whether it is paid into court under the Trustee Relief Act or not.

If a mortgagee upon a fund in court in an administration suit becomes bankrupt, having raised money on his security from more than one sub-mortgagee, a second incumbrancer, by getting a stop order, does not gain priority over a first who merely gives notice to the executor.

The effect of paying money into court under the Trustee Relief Act is simply to relieve the trustee from liability, and does not divest him of the character of trustee, nor invest the court nor the Accountant-General with such character. *Thompson* v. *Tomkins*, V.C.K. 610; 8 Jur. N. S. 185; 6 L. T. N. S. 305.

16. *Mortgage of equitable interest—Priority—Notice to one of several trustees.*—In a mortgage of an equitable interest in a fund, a notice by the mortgagee to one of the trustees is sufficient to establish the priority of the mortgage over subsequent incumbrances, although the trustee on whom the notice was served was the husband of one of the persons beneficially interested in the fund. *Willes* v. *Greenhill*, L.C. 33; 7 Jur. N. S. 1134; 5 L. T. N. S. 336; 31 L. J. Ch. 1.

17. *Priority—Notice—Fagg* v. *James*, M.R.; 6 L. T. N. S. 675.

18. *Suit by puisne incumbrancer.*—A prior mortgagee is not bound to go in under a decree in a suit instituted by a puisne incumbrancer, but may institute a suit of his own. *Arnold* v. *Bainbrigge*, L.J.; 2 De G. F. & J. 92.

19. *Mortgagee in possession—Wilful default — Rent — Purchase of reversion.*—Where a mortgagee in possession of leaseholds, being resident at a distance, employs an agent, and the property is advertised and let at intervals, but vacant for a long period, the mortgagee acting on the agent's advice in not letting, such mortgagee is not chargeable under a decree for wilful default in non-receipt of rent. But where a tenant is suffered to remain for several years in possession, paying no rent, and none being demanded by the mortgagee, he is liable for wilful default as to such rent.

Where a mortgagee in possession pays rent to the ground landlord, he is to be allowed such rent in account, but not after he has purchased the reversion; but he will be allowed payments made to a person for taking charge of the premises to save them from deterioration.

The onus lies, prima facie, on the party charging wilful default in not letting, to prove it; but if he shows that the property can be let, or has been let, the onus is transferred to the other party to show that he has not been guilty of wilful default, but has been vigilant. *Brandon* v. *Brandon*. V.C.K. 287.

[TO BE CONTINUED.]

Notices of New Books.

REPORT OF THE CASE OF GEORGE C. HERSEY, indicted for the Murder of Betsy Frances Tirrell, before the Supreme Judicial Court of Massachusetts. By JAMES M. W. YERRINGTON. Boston: A. Williams & Co. 1862. 1 vol. 8vo. pp. 267.

"Probably no case of poisoning," says the reporter in the preface, "has ever created so great an interest in this country as that which forms the subject of this report. As a case of circumstantial evidence, it possesses remarkable interest, while it is believed to be the only published trial for murder in which the presence of strychnine has been detected by chemical analysis in the body of the deceased. In the celebrated English case of William Palmer, which has heretofore been the leading case upon this poison, the chemists could detect no trace of strychnine in the body of the deceased, while in this case it was produced in large quantity."

There is a certain interest which attaches to this trial. Beside the report of mere technicalities, it presents vivid pictures of the sad realities which lie at its heart. And when the page passes even in a very slight degree beyond the strictly professional, the technicalities will be found mingled with abundant and exciting narrative.

A nice question of criminal pleading arose in the case. The pleader omitted to aver in the indictment that the defendant, in administering poison to the deceased, did it with an intent to kill and murder. And it was decided that such an averment is not necessary. The rule of pleading applicable to the description of this and similar crimes is admirably stated in the opinion of the court which was delivered by Chief Justice Bigelow. But we dissent from the Chief Justice when he cites Wharton's Precedents among "text books of approved authority." Especially since the late Chief Justice, in the case of *Commonwealth*

v. *Nutting*, Middlesex, 1858, which was a capital case, refused to allow the counsel for the prisoner even to cite it.

REPORTS OF CASES ARGUED AND DETERMINED IN THE SUPREME COURT OF THE UNITED STATES, at December Term, 1861. By J. S. BLACK, LL.D. Vol I. Washington, D. C.: W. H. & O. Morrison. 1862. 8vo. pp. 649.[1]

To convey the fullest information in the least space is one canon of reporting. To reconcile brevity with clearness is another. These, the reporter has accomplished in a commendable degree, considering the kind and character of the cases reported. The arguments of counsel, in many instances, might have been considerably abridged, thereby achieving brevity without surrendering utility. The marginal notes are, for the most part, concise and accurate. Some of them might have been omitted without detriment. More care should have been taken in reading the proof-sheets and in verifying the references to cases cited in the arguments; and a more uniform method of citation should have been observed. The reporter is entitled to the thanks of the profession for the promptness with which he has issued this volume. It contains many cases of immediate interest.

We print the following passage from the opinion of Mr. Justice GRIER in *Farni* v. *Tesson*, p. 315. It deserves the attention of every lawyer and legislator in the Union: —

"It is no wrong or hardship to suitors who come to the courts for a remedy, to be required to do it in the mode established by the law. State legislatures may substitute, by codes, the whims of sciolists and inventors for the experience and wisdom of ages; but the success of these experiments is not such as to allure the court to follow their example."

[1] In the Memoranda we are informed that "Mr. Howard, the late reporter, being a candidate for Governor of Maryland, resigned during the vacation, and at the beginning of the term, Mr. Black, of Pennsylvania, was appointed by the court in his place."

Hotch-Pot.

It seemeth that this word *Hotch*-pot, is in English a pudding, for in this pudding is not commonly put one thing alone, but one thing with other things put together. — LITTLETON, § 267, 176 a.

In the decision in *Rogers* v. *Kenwrick*, Quincy, 62, 3 Geo. 3 (not yet published), reprinted in our August Number, 1862, the Superior Court of Judicature of Massachusetts Bay anticipated by forty years the decision of the Court of King's Bench in the case of *Doe* v. *Rosser*, 3 East, 16 (1802), on the same point.

The New York Daily Transcript deservedly censures the practice of publishers issuing law books with *reprint titles*, a contemptible form of lying under which they endeavor to persuade the public of the rapidity of their sales, and to dispose of unsaleable editions.

Walpole, in his Royal and Noble Authors, speaks of Lord SOMERS as "One of those divine men, who, like a

chapel in a palace, remain unprofaned, while all the rest is tyranny, corruption, and folly."

In the Quarterly Review, Dec. 1844, the late Mr. Justice TALFOURD wrote of Lord ELDON and Lord STOWELL:—

"If, however, these great lawyers were not prodigal of extensive entertainments, they loved good cheer themselves, and delighted to believe that it was enjoyed by others. No total abstinence, nor half-abstinence, system was theirs. Whether the statement be true, which the genial biographer of Lord Stowell in the 'Law Magazine' makes, 'That he would often take the refection of the Middle Temple Hall by way of whet for the eight o'clock banquet,' we will not venture to assert; but we well remember, more than thirty years ago, the benignant smile which Sir William Scott would cast on the students rising in the dim light of their glorious hall, as he passed out from the dinner table to his wine in the parliament chamber; his faded dress and tattered silk gown set off by his innate air of elegance; and his fine pale features beaming with a serene satisfaction which bumpers might heighten but could not disturb. He and Lord Eldon perfectly agreed in one great taste—if a noble thirst should be called by so finical a name—an attachment to port wine, strong almost as that to constitution and crown; and, indeed, a modification of the same sentiment. Sir William Scott may possibly in his lighter moods have dallied with the innocence of claret—or, in excess of the gallantry for which he was famed, have crowned a compliment to a fair listener with a glass of champagne—but, in his sedater hours, he stood fast by the port, which was the daily refreshment of Lord Eldon for a large segment of a century. It is, indeed, the proper beverage of a great lawyer—that by the strength of which Blackstone wrote his Commentaries—and Sir William Grant meditated his judgments—and Lord Eldon repaired the ravages of study, and withstood the shocks of party and of time. This sustaining, tranquillizing power, is the true cement of various labors, and prompter of great thoughts. Champagne, and hock, and claret, may animate the glittering superficial course of a Nisi Prius leader—though Erskine used to share his daily bottle of port with his wife and children, and complain, as his family increased, of the diminution of his residue—but port only can harmonize with the noble simplicity of ancient law, or assuage the fervor of a great intellectual triumph. Each of the Scotts, to a very late period of his old age, was true to the generous liquor, and renewed in it the pastimes of youth and the crowding memories of life-long labor. It is related of Lord Stowell that, a short time before his death, having, in the deepening twilight of his powers, submitted to a less genial regimen, on a visit from his brother he resumed his glass: and, as he quaffed, the light of early days flashed upon his overwrought brain—its inner chamber was irradiated with its ancient splendor—and he told old stories with all that exquisite felicity which had once charmed young and old, the care-worn and the fair—and talked of old friends and old times with more than the happiness of middle age. When Lord Eldon visited him in his season of decay at his seat near Reading, he sometimes slept at Maidenhead on his way; and on one occasion, having dined at the inn, and learned that the revising barristers were staying at the house, he desired his compliments to be presented to them, and requested the favor of their company to share his wine. He received the young gentlemen—very young compared with their host—with the kindest courtesy; talked of his early struggles and successes, as much for their edification as delight—and fin-

ished *at least* his own bottle of port before they parted. Surely no lighter or airier liquor could befit such festal hours of honored old age, or so well link long years together in the memory by its flavors!"

A friend who called our attention to this passage, writes, "We cannot agree with Mr. Justice Talfourd in his undisguised contempt for champagne, or his superciliousness towards claret."

The author of "Common Law and Roman Law" is Mr. George A. Matile, formerly a judge of one of the highest courts in Switzerland and professor of law in the University of Neufchatel. Political troubles in that country compelled this learned jurist and excellent person to seek an asylum in this country, and he is now a member of the Bar in the city of New York. We wish some arrangements might be made to enable those in our community who are interested in such subjects, to have the benefit of his instructions as a lecturer.

The second volume of the Massachusetts Digest will be published in January.

Messrs. Lee & Shepherd advertise a large and well selected stock of books. Their prices cannot fail to suit the most economical. They supply all the law books on the catalogue of Mr. T. W. Reeve, of New York.

INSOLVENTS IN MASSACHUSETTS.

Name of Insolvent.	Residence.	Commencement of Proceedings.	Name of Judge.
		1862.	Returned by
Albright, John G.	Dorchester,	October 16,	George White.
Blanchard, Noah	Chelsea,	" 17,	Isaac Ames.
Carter, Elizabeth	Boston,	" 31,	Isaac Ames.
Edson, Henry	North Bridgewater,	" 28,	William H. Wood.
Flanders, Fannel	Lowell,	" 18,	William A. Richardson.
Foster, Edwin K.	Boston,	" 27,	Isaac Ames.
Gay, Nathan U.	Waltham,	" 15,	William A. Richardson.
Gilbert, Timothy (1)	Boston,	" 20,	George White.
Godfrey, Charles G.	Medway,	" 7,	George White.
Grew, James L.	North Bridgewater,	September 20,	William H. Wood.
Haney, Thomas	Boston,	October 20,	Isaac Ames.
Harlow, John A.	North Bridgewater,	September 20,	William H. Wood.
Hersey, Avery	Abington,	October 27,	William H. Wood.
Hersey, Isaac	Abington,	" 27,	William H. Wood.
Jameson, William H. (1)	Brookline,	" 20,	George White.
Kimball, William Eustace	North Andover,	" 23,	George F. Choate.
Lane, Peter	Abington,	" 27,	William H. Wood.
Neagle, William (2)	Roxbury,	" 15,	George White.
Pemberton, Francis K.	South Danvers,	" 21,	George F. Choate.
Perkins, Timothy D. (3)	Lee,	August 11,	J. T. Robinson
Reed, Marcus	Abington.	October 27,	William H. Wood.
Rust, William P. (4)	Gloucester,	" 8,	George F. Choate.
Shepherd, Joseph L. (4)	Gloucester,	" 8,	George F. Choate.
Smith, Joseph	Abington,	" 27,	William H. Wood.
Tanner, Edward P. (3)	Lee,	August 11,	J. T. Robinson.
Ware, Ephraim G.	Boston,	October 23,	Isaac Ames.
Watson, Spencer C.	Quis,	September 24,	J. T. Robinson.
Whittemore, William H.	West Cambridge,	October 29,	William A. Richardson.
Wiley, David	South Reading,	" 18,	William A. Richardson.
Willard, Daniel	Ashby,	" 29,	William A. Richardson.
Winchell, Homer	Lanesboro',	August 1,	J. T. Robinson.

PARTNERSHIPS.

(1) Timothy Gilbert & Co.; (2) Neagle & Carpenter, New Orleans, and W. & G. B. Neagle, Boston; (3) Tanner & Perkins (4) Shepherd & Rust.